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IN THE SUPREME COURT OF THE UNITED STATES

KRISTINA S.,
Petitioner
v.

CHARISMA R.,
Responent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

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QUESTIONS PRESENTED

1. Whether a fit parent's fundamental right to direct the upbringing of her child is infringed when a court creates a parental relationship with equal and co-extensive parental rights, retroactive to birth, between the parent's child and a former same-sex partner who lived with the child for only three months with no further contact except by court order and whose legal relationship with the biological parent was terminated more than one year before state law accorded parental rights to domestic partners.

2. Whether a former same-sex partner who lived with a child for only three months and was not part of a legal relationship that accorded parental rights to same-sex partners could establish a constitutionally protected liberty interest in a relationship with her former partner's biological child sufficient to justify defining the former partner as a parent endowed with fundamental parental rights under the Due Process clause.

PARTIES

The parties are Kristina S., Petitioner, and Charisma R., Respondent.

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The Supreme Court of California's order denying review is unpublished and is reproduced at Appendix, p. 1a. The opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, is reported at 175 Cal.App. 4th 361 and reproduced at Appendix, pp.2a-81a. The decision of the Superior Court of Alameda County is unpublished and is reproduced at Appendix, pp. 83a-98a.

JURISDICTION

The judgment of the Court of Appeal was filed on June 26, 2009. The Supreme Court of California denied review on September 9, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

> property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Family Code § 7611(d). Status as natural father; presumption; conditions:

> A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:
>
> (d) He receives the child into his home and openly holds out the child as his natural child.

STATEMENT OF THE CASE

A parent's right to direct the upbringing of her children is among the few rights "long recognized at common law as essential to the orderly pursuit of happiness by free men" and therefore regarded as a fundamental liberty interest protected by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). This Court has accorded those rights judiciously, insisting that an award of parental rights respect the teachings of history and the basic values that underlie our society. *Michael H.*, 491 U.S. at 122-123. This Court's parental rights decisions rest upon "the historic respect–indeed, sanctity would not be too strong a term–traditionally accorded to the

relationships that develop within the unitary family."*Id.* That sanctity has been substantially undermined by the California Court of Appeal's determination that Charisma, a former same-sex partner who lived with Kristina's daughter for only three months, was not part of a relationship that accorded parental rights to partners and did not develop a parent-child bond with the child is a "second mother" with the same parental prerogatives enjoyed by Kristina.

Kristina and Charisma were living together at the time Kristina underwent artificial insemination, became pregnant and gave birth to her daughter, A.S. (App., 5a). Charisma was present in the delivery room when A.S., was born in April 2003. (App., 5a). Kristina brought A.S. home to the apartment she shared with Charisma. (App., 5a). Charisma assisted with child care and watched A.S. during working hours once Kristina returned to work. (App., 6a). Charisma wrote messages on electronic message boards and electronic mail messages claiming that A.S. was "her baby." (App., 28a-29a). Charisma also told acquaintances and a nurse that A.S. was "her baby." (App., 28a-29a).

When A.S. was only three months old, on June 30, 2003, Kristina and A.S. moved out of the apartment they shared with Charisma. (App., 6a). Charisma saw A.S. on two occasions in the summer of 2003 and did not see her again until 2008 as part of a court-ordered "reunification" plan visit in Texas. (App., 6a).

At the time of A.S.'s birth, Kristina and Charisma were registered domestic partners in California. (App., 3a, 6a). Kristina terminated the

domestic partnership in July 2003, more than a year before California's Assembly Bill 205 (AB205), which granted marital rights to domestic partners, became effective. (App., 6a). Consequently, the additional rights bestowed upon California domestic partners by AB205, including parental rights and responsibilities as to each other's children, did not attach to the parties' relationship. (App., 6a).[1]

Nevertheless, Charisma asked the court to bestow those rights upon her when, in May 2004 – almost a year after Kristina and A.S. moved out – she filed a petition asking the court to establish a parental relationship between her and A.S. (App., 6a). The Alameda County Superior Court dismissed the petition for lack of standing. (App., 6a).

In 2005, Kristina and A.S. moved to Texas. (App., 6a). In 2006, the California Court of Appeal reversed the trial court's dismissal and remanded the case with instructions to reconsider Charisma's request in light of recent California Supreme Court decisions rendered after Charisma had filed her action, which addressed parental rights among same-sex couples.[2] (App., 7a).

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[1] AB205 expressly provides that its provisions do not apply to parties like Kristina and Charisma who terminated their domestic partnerships before January 1, 2005. Cal. Family Code §297.5(d).

[2] *Elisa B. v. Superior Court,* 37 Cal.4th 108 (2005), *K.M. v. E.G.* 37 Cal.4th 130 (2005), *Kristine H. v. Lisa R.*, 37 Cal.4th 156 (2005).

On remand, the Superior Court found that Charisma qualified as a presumed parent under a gender neutral reading of California Family Code §7611(d). (App.,6a). In particular, the court found that Charisma had met the standards of having accepted A.S. into her home and holding A.S. out as her natural child. (App., 28a-31a). The Superior Court also ruled that the presumption was not rebutted because it found that Charisma had actively participated in A.S.'s conception and birth with an expectation that she would help raise A.S., that Charisma voluntarily accepted the rights and obligations of parenthood and that there were no competing claims to being a second parent. (App., 31a-41a). The court ordered that a custody evaluation be conducted, and on May 8, 2008 issued its final order declaring that Charisma is a presumed parent and directing that a "reunification" and visitation plan proceed. (App., 82a-98a).

The California Court of Appeal affirmed. (App. 1a-80a). As well as affirming the trial court's finding that Charisma is a "second mother" under California Family Code §7611(d), the Court of Appeal rejected Kristina's claim that granting parental rights to Charisma violates Kristina's fundamental parental rights under the Fourteenth Amendment as described by this Court in *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). (App., 66a). Kristina initially raised these claims in her response to Charisma's appeal of the dismissal of her actions, and they were raised again in Kristina's appeal of the parentage order, which is the matter before this Court for consideration.

> In *Charisma [R. v. Kristina S.], supra*, 140 Cal.App. 4th[301] at page 308 [2006], because this court remanded for

> further factual findings, we declined to address Kristina's claim "that it would violate her federal constitutional rights were we to conclude that Charisma is A...[S]'s parent under the [UPA]." (App, 53a).
>
> Because Kristina's constitutional claims are a matter of substantial public interest in this rapidly evolving area of family law, we exercise our discretion to decide the claims presented by Kristina on appeal in light of the trial court's factual findings.

(App., 55a). In response to Kristina's claim that declaring Charisma to be a parent violates Kristina's rights under *Troxel*, the Court of Appeal said that *Troxel* did not apply because the court was calling Charisma a parent so it was not granting parental rights to a *non-parent*. (App., 62a). The Court went on to conclude that because Charisma was in a relationship with Kristina and might have assisted Kristina in undergoing artificial insemination she had an "inchoate parentage claim" at the time of the baby's birth. (App., 62a). According to the court, although that "inchoate" claim was not legally complete until the baby was brought into the apartment shared by Kristina and Charisma, it nevertheless arose as to Charisma at the same time that it arose as to Kristina, the biological mother. (App., 61a-62a). Therefore, according to the court, parental rights were not being conferred on an "unrelated individual," but were merely being recognized as already existing since birth. (App., 62a). Accordingly, the Court of Appeal found that *Troxel*

did not apply and that declaring Charisma a "second mother" did not infringe upon Kristina's fundamental parental rights. (App., 62a).

The California Supreme Court denied review on September 9, 2009. (App, 1a).

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA APPELLATE COURT'S DECISION FURTHER ILLUSTRATES THE PERVASIVE CONFLICT THAT CONTINUES TO GROW AMONG THE STATES CONCERNING THE PARENTAL RIGHTS OF FIT, BIOLOGICAL PARENTS VIS-A-VIS FORMER PARTNERS.

The California court's decision is the latest example of the growing, pervasive split among the states concerning the rights of fit, biological parents vis-à-vis rights asserted by former same-sex partners. The conflicting opinions and inconsistent analysis of parental rights under *Troxel* cogently illustrate the need for this Court's clarification and guidance in a growing area of family law jurisprudence.

For more than 85 years, this Court has recognized that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests protected by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*,

268 U.S. 510, 534-535 (1925). The child is not merely a creature of the State whose care can be doled out at the whim of a legislature, administrative agency or court. *Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535; *Troxel*, 530 U.S. 57, 65-66. Instead, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Id.* "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will **normally** be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69 (emphasis added). This Court did not elaborate on what it meant by "normally," therefore leaving unanswered the question of when a state can inject itself into the private realm of the family.

As the Colorado Court of Appeals observed: *"Troxel did not resolve exactly what compelling state interests* subordinate the substantive due process rights and attendant presumptions accorded a fit, legal parent in a dispute with a nonparent over parental responsibilities." *In re E.L.M.C.*, 100 P.3d 546, 557 (Colo.App., 2004) (emphasis added). Without guidance from this Court and with an increasing number of parental rights claims from non-parents, particularly former same-sex partners, the states have created a Gordian knot of conflicting decisions.

This case is the latest strand in that knot and illustrates why this Court's review is urgently needed.

A. At Least Twelve States Have *Refused To Grant* Former Partners Parental Rights Over the Objection Of Fit Biological Parents.

Appellate courts in at least twelve states have held that former same-sex partners cannot acquire parental rights over their former partner's objections. While not all of the states have specifically referenced *Troxel*, all have emphasized the primacy of the fit, biological parent's right to direct the upbringing of her children in finding that the former partners could not overcome that right.

A former same-sex partner who had lived with a child for nearly four years and had visitation for several months after the relationship ended was denied parental rights by the Missouri Court of Appeals. *White v. White*, 293 S.W.3d 1, 16 (Mo. Ct. App. 2009). In *White*, the former partner sought parental rights under Missouri's version of the Uniform Parentage Act, as a *de facto* or equitable parent and under *in loco parentis*. *Id.* The court found no basis for relief under the Missouri parentage statutes. *Id.* at 11. The court also found no standing as a *de facto* or equitable parent under Missouri law. *Id.* at 15. Without deciding whether the partner satisfied the *in loco parentis* criteria, the court held that even if she did, the status would not accord her any parental rights once she stopped living with the

biological mother and child. *Id.* at 16. Therefore, the partner had no legal standing to seek parental rights over her former partner's child. *Id.* at 17.

The Maryland Court of Appeals held that a former same-sex partner could not acquire rights as a *de facto* parent without first proving that the biological mother was unfit or that there were exceptional circumstances to overcome the mother's liberty interest in the care, custody, and control of her child. *Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008). The court refused the partner's request to recognize *de facto* parent status as a legal status in Maryland. *Id.* at 87. "We refuse to do so because, even assuming arguendo that we were to recognize such a status, short-circuiting the requirement to show unfitness or exceptional circumstances is contrary to Maryland jurisprudence...." *Id.*

The Massachusetts Supreme Judicial Court refused to grant parental rights to a former same-sex partner who resided with the child and provided significant financial support for 18 months but never adopted the child. *A.H. v. M.P.*, 857 N.E.2d 1061, 1072-1073 (Mass. 2006). The court found that a parent can be compelled to yield her fundamental parental rights under *Troxel* only when a significant pre-existing relationship between her child and former partner has created a parent-child attachment so that severing contact would harm the child. *Id.* at 1072. No such relationship had developed between A.H. and her former partner's daughter, even though they had lived together for most of the child's life. *Id.* Therefore, A.H. could not be granted parental rights against the biological mother's wishes even though

the parties had entered into an agreement to have and raise the child together. *Id.*

Similarly, the Virginia Court of Appeals refused to grant a former same-sex partner parental rights over the objections of the fit biological mother. *Stadter v. Siperko*, 661 S.E. 2d 494, 499 (Va. Ct. App. 2008). Citing to *Troxel*, the court held that it cannot grant parental rights to non-parents against the expressed wishes of the fit biological parent unless the decision can be justified by a compelling state interest. *Id.* at 497. "[T]o constitute a compelling interest, state interference with a parent's right to raise his or her child must be for the purpose of protecting the child's health or welfare." *Id.* at 498.

> We have held that compelling state interests in a child's health or welfare will operate to overcome the presumption in favor of a fit biological parent in certain specific circumstances, including where a parent "voluntarily relinquishes" custody and care of a child to a non-parent, or where it has been "established by clear and convincing evidence [that there are] 'special facts and circumstances ... constituting an extraordinary reason for taking a child from its parent, or parents.'"

Id. (citing *Wilkerson v. Wilkerson*, 200 S.E.3d 581, 583 (Va. 1973)). No such circumstances were found in *Stadter*, so the former same-sex partner could not be granted parental rights against the wishes of the fit biological mother. *Id.* at 498-499. The court also rejected the partner's contention that she acquired

rights as a *de facto* parent under *Troxel* because she co-habited with the child for a sufficient time (18 months) to establish a parent-child bond. *Id.* As the Massachusetts court did in *A.H.*, the Virginia court held that the former partner could not acquire rights as a *de facto* parent against the wishes of the fit biological mother unless the partner could prove that denying her parental rights would harm the child. *Id.* Absent such proof, the biological mother's fundamental rights under *Troxel* would not be disturbed. *Id.* at 499.

The Utah Supreme Court refused to grant a former same-sex partner who had lived with the 26-month old child for two years – and was a judicially denominated co-guardian – visitation over the objections of the fit biological mother. *Jones v. Barlow*, 154 P.3d 808 (Utah 2007). The Utah court found that the partner lacked standing to seek visitation under an *in loco parentis* theory because all rights and obligations end when the *in loco parentis* relationship is terminated. *Id.* at 812. The court also refused to judicially create visitation rights by applying a "de facto parent" or "psychological parent" doctrine. *Id.* at 819.

The Texas Court of Appeals also refused to grant parental rights to a former same-sex partner under the *in loco parentis* doctrine. *Coons-Andersen v. Andersen*, 104 S.W. 3d 630, 636 (Tx. App. 2003). In *Coons-Andersen*, the partner had lived with the child for 18 months, had a written co-parenting agreement with the biological mother and had visitation even after the couple dissolved their relationship. *Id.* The Texas court held those factors were not sufficient to

grant the partner parental rights over the objection of the biological mother. *Id.*

A former same-sex partner in Florida was denied parental rights under both the psychological parent and *in loco parentis* doctrines. *Kazmierazak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999). The Florida court found that even if the partner could establish that she was a psychological parent, she would not be entitled to parental status equal to the biological parent. *Id.* at 110. In addition, *in loco parentis* status was applicable only to marital relationships, and therefore could not be applied to the partner. *Id.*

The Appellate Court of Illinois also denied a former same-sex partner's claim for parental rights under common law doctrines of *de facto* parent and *in loco parentis*. *In re Visitation with C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999). The court found that the common law doctrines were superseded by statute, and that the statute did not provide for parental rights for former same-sex partners.

In denying petitions for visitation brought by former same-sex partners, the Tennessee Court of Appeals stated, "we are unaware of and have not been cited to any prior controlling precedent that has utilized the concept of either *de facto* parenthood and/or *in loco parentis* to extend constitutional parental rights, including the right to visitation, to unmarried/unrelated persons in White's and/or Looper's position." *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

The New York Court of Appeals also rejected a former same-sex partner's request for visitation over the objections of the fit biological mother. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991). In *Alison D.*, the former partner lived with the child for two years and engaged in visitation for three years. *Id.* Nevertheless, the court found that the partner did not have the right as either a parent or *de facto* parent to "limit or diminish the right of the concededly fit biological parent to choose with whom her child associates." *Id.*

Citing *Alison D.*, the Michigan Court of Appeals found that a same-sex partner could not seek custody of her deceased partner's children over the objection of the children's fit biological father. *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995).

In all of these cases, the courts found that facts such as the partner and child living together for most of the child's life, a written parenting agreement, and continued visitation after the relationship resolved were not sufficient to overcome the parent's fundamental rights under *Troxel*. Notably, none of those factors was present in this case, yet the Court of Appeal found no infringement of Kristina's rights.

B. At Least Ten States Have Found That Former Same-Sex Partners Can Acquire Parental Rights Over Their Former Partner's Children.

At least ten states have found such factors rejected by the courts enumerated above, or even fewer factors, sufficient to overcome a fit biological parent's rights in the face of a former same-sex partner's request for parental rights. In some cases, the courts have found that the former partner had rights as a *de facto* or psychological parent, but in other cases no such specific showing was required.

The Vermont Supreme Court upheld a grant of parental rights to a former same-sex partner who was in a civil union with the biological mother, but had no biological or adoptive relationship. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt., 2006). As the Court of Appeal did here, the Vermont court relied upon subjective evaluation of the parties' relative expectations and states of mind to conclude that the former partner obtained equal and co-extensive parental rights over the objections of the fit, biological mother. *Id.* Among the "many factors" that the court said justified intrusion upon the mother's parental rights were a purported expectation and intent that the parties would both be parents, joint participation in prenatal care and birth, an impression that both parties treated the partner as a parent and the fact that there was no other person seeking to be a parent. *Id.*

Other courts have attempted to establish more objective standards for overriding the biological parent's fundamental rights, but they have failed to accord sufficient deference to the fundamental rights of the biological parent. The Wisconsin Supreme Court established a four-part *de facto* parent test that a number of other courts have followed in addressing same-sex parentage claims. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419,435-436 (Wis.1995). Under that test, a former same-sex partner could be eligible for parental rights if she could demonstrate that the biological parent consented to and fostered formation of a "parent-like" relationship with the child, that the partner lived in the same household, the partner assumed "obligations of parenthood," and had been in a "parental role for a length of time sufficient" to have established a relationship that is "parental in nature." *Id.* The Wisconsin court also found that the former partner had to prove that the biological parent "interfered" with the parent-like relationship and had to seek visitation "within a reasonable time." *Id.* None of the terms in quotations was defined, leaving the protection of a parent's fundamental rights to the discretion of individual judges.

The Rhode Island Supreme Court used the *H.S.H.-K.* factors to justify granting visitation rights to a former same-sex partner after the biological mother permitted but then halted visitation. *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I.,2000). The court emphasized that "DiCenzo's constitutional rights as the child's natural mother to superintend his future upbringing and his associations with adults other than DiCenzo are not absolute." *Id.* The court held that the mother's conduct in permitting the partner to

assume a role as the child's parent and in signing a consent order agreeing to "permanent visitation" rendered her own parental rights less exclusive and less exclusory than they otherwise would have been. *Id.* "Under these circumstances, we do no violence to DiCenzo's constitutional rights" by holding that the mother is stopped from denying a presumption of parental rights in favor of the former partner. *Id.*

The New Jersey Supreme Court applied similar logic to find that a same-sex partner had obtained rights as a psychological parent. *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000). The court cautioned that a biological parent could lose her fundamental rights under *Troxel* if she permitted her partner to interact "too much" with her child. *Id.* at 552.

> That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.

Id. While appearing to respect the standards this Court set in *Troxel*, the court's statement actually creates a trap for an unwary parent who might find that in seeking help with child care or other duties she unwittingly surrendered her right to direct the upbringing of her child.

The Colorado Court of Appeals found the *Troxel* presumption in favor of the biological mother was rebutted by a threat of emotional harm that might befall the child if visitation with the former partner were curtailed. *In re E.L.M.C.*, 100 P.3d 546, 567 (Colo. Ct. App. 2004). The court found "overwhelming evidence" to support the partner being declared a psychological parent over the child. *Id.* The potential for emotional harm to the child constituted a compelling state interest sufficient to overcome the mother's rights under *Troxel*. *Id.*

The West Virginia Supreme Court of Appeals also found that if a former same-sex partner could be determined to be a psychological parent, then she would have standing to seek parental rights. *In re Clifford K,* 619 S.E.2d 138, 157 (W.Va. 2005). The West Virginia court opened the concept of psychological parent to "a biological, adoptive, or foster parent, or any other person" who on a continuing day to day basis provides for a child's emotional and financial support. *Id.* Utilizing that definition, the court held "that, in exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to W. Va.Code § 48-9-103 (2001) (Repl.Vol.2004) when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication." *Id.* at 157-158. Therefore, as was true with *In re H.S.H.-K.*, the West Virginia court left the fate of a parent's fundamental rights to the discretion of judges.

The Indiana Supreme Court held that same-sex former partners could acquire some of "the innumerable social, psychological, cultural, and

biological considerations that significantly benefit the child and serve the child's best interests" which would entitle them to obtain parental rights. *King v. S.B.*, 837 N.E.2d 965, 967 (Ind. 2005). The court did not address the merits of the claim, but reversed the lower court's dismissal and held that the partner was not precluded from acquiring parental rights. *Id.*

The New Mexico Court of Appeals mentioned the best interests of the child, but did not mention the parent's fundamental rights when it found that a parenting agreement between a former same-sex partner and the biological mother was not unenforceable *per se*. *A.C. v. C.B.* 829 P.2d 660, 666 (N.M. Ct. App. 1992).

The Maine Supreme Court held that when the biological parent did not contest a finding that the former sex-partner was a *de facto* parent, then the partner had the right to seek an award of parental rights and responsibilities. *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004).

The latest addition to the mix, the Court of Appeal's decision in this case, is the most extreme. The court found that Charisma had parental rights equal in scope and extent to Kristina's even though there was no written parenting agreement, continued visitation nor prolonged cohabitation as in the other cases. Furthermore, Kristina took deliberate steps to prevent an inference of a parental relationship between Charisma and A.S. (App., 6a). Nevertheless, the court found that granting Charisma equal and co-extensive parental rights did not infringe upon any rights held by Kristina. The California court went so far as to say that *Troxel* did not even apply. The court

reasoned that since it granted Charisma rights retroactive to A.S.'s birth Charisma was a parent *with existing fundamental rights*, not a non-parent being given fundamental rights at the expense of a parent. (App., 62a).

The extraordinary holding by the California court illustrates the deepening divide between state courts on the issue of when fundamental parental rights must give way to claims by non-parents. The increasing conflict among state courts on this vital constitutional issue should be resolved by this Court.

II. THE CALIFORNIA COURT DECIDED THE QUESTION OF WHEN PARENTAL RIGHTS CAN BE CONFERRED ON A FORMER SAME-SEX PARTNER IN A WAY THAT CONFLICTS WITH THIS COURT'S PRECEDENTS LIMITING SUBSTANTIVE DUE PROCESS TO FUNDAMENTAL RIGHTS ROOTED IN TRADITION.

This Court has long emphasized the need for restraint in defining rights encompassed within the concept of substantive due process. *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Moore v. East Cleveland*,431 U.S.494 (1977), *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). "That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will." *Michael H.*, 491 U.S. at 122 (citing *Moore*, 431 U.S. at 544 (White, J., dissenting)). "The Judiciary, including this Court, is the most vulnerable and comes nearest

to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." *Id.* "Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers..., the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause. . . ." *Id.*

The Court has exercised this restraint by insisting "not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society." *Michael H.*, 491 U.S. at 122. Consequently, this Court has held that the "Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (citing *Snyder*, 297 U.S. at 105). "Our cases reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society....'" *Id.* at 122-123 (citing *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J. concurring)).

This respect for history is evident in this Court's parental rights decisions. *Id.* at 123. The Court has not granted parental rights based merely upon isolated factors which might be present in varying degrees in different factual scenarios, but upon the "historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the relationships that develop within the unitary family." *Id.* "Our decisions establish that the Constitution

protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 123-124.

In *Michael H.*, that respect for tradition meant that the relationship between the biological father, who had an extramarital affair with the biological mother, and his daughter was not constitutionally protected because it has not been historically treated as a protected family unit. *Id.* at 124. Respect for the unitary family also means upholding a *de facto* family unit against an estranged biological father's request to be declared a parent and halt adoption by a stepfather in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest,'" *Id.* (citing Stewart, J., concurring)). *Quilloin* was not such a case.

This *is such a case*. The California court has ordered the break-up of the autonomous, natural family comprised of Kristina and her daughter, over Kristina's objections, with no showing of unfitness, in favor of a new judicially created "family" comprised of Kristina, her daughter and her former partner. The sole reason for this redefinition of Kristina's family is that the Court of Appeal believed that it is in A.S.'s best interest to have two parents, even if one parent must be judicially created. (App., 51a). This Court rejected a similar proposed redefinition of family and expansion of substantive due process protection to a married woman, her lover and their child in *Michael*

H, 491 U.S. at 124. This Court warned that such an expansion would render the concept of family and parental rights constitutionally insignificant. *Id.* at 124 n.3. That is the result of the Court of Appeal's decision in this case.

The Court of Appeal has impermissibly expanded substantive due process in a way which contradicts this Court's well-established precedents and invades the sanctity of the family. Kristina respectfully requests that the Court grant certiorari to address the contradiction.

CONCLUSION

The question of whether, and if so, when, former same-sex partners can obtain parental rights over their former partners' children is a matter of considerable importance throughout the country as increasing numbers of same-sex couples utilize assisted reproduction to have children. State courts are increasingly divided on these significant questions regarding the nature and extent of the parental rights protected under substantive due process.

This Court should grant Kristina's request for a writ of certiorari to resolve these critical constitutional issues.

December, 2009

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APPENDIX

Court of Appeals, First Appeals, First Appellate District, Division Five, No. A122264

S175253

IN THE SUPREME COURT OF CALIFORNIA
En Banc

CHARISMA R., Plaintiff and Appellant

v.

KRISTINA S.,A Defendant and Appellant

The Petition for Review is denied.

Filed: Sep. 9 2009
Frederick K. Ohlrich, Clerk

George

Chief

Justice

6/26/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

A122264

(Alameda CountySuper. Ct. No. HF04153838)

CHARISMA R.,

Plaintiff and Appellant,

v.

KRISTINA S.,

Defendant and Appellant.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts IV. and V.

Charisma R. (Charisma) and Kristina S. (Kristina) were a same sex couple who began dating in July 1997, moved in together in August 1998, and registered as domestic partners with the State of California in January 2002.[1] In December 2001, the couple decided they wanted to have children and Kristina would be the first to try to become pregnant. Following several months of effort, Kristina became pregnant by artificial insemination and gave birth to Amalia in April 2003. In July 2003, Kristina moved out of the home she shared with Charisma, taking Amalia with her. Kristina appeals from the trial court's orders declaring Charisma a presumed parent of Amalia and establishing a schedule for reunification of Charisma and Amalia. Among other things, we reject Kristina's contentions that Charisma did not parent Amalia for a sufficient period of time to be declared a presumed parent

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1 In order to protect the confidentiality of the minor child, we refer to the parties by their first names. (*Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, 160, fn. 1.)

under Family Code section 7611, subd. (d) (hereafter section 7611(d)),[2] and we hold Kristina has not shown the trial court's orders violate her constitutional rights to equal protection and due process. In a cross-appeal, Charisma contends the court misunderstood the scope of its authority with respect to allocation of her travel expenses for the reunification process. The cross-appeal has merit. We affirm the trial court's orders except as to allocation of the travel expenses, which we reverse and remand to provide the court an opportunity to exercise its discretion.[3]

BACKGROUND

After deciding they wanted children, Charisma and Kristina contacted a sperm bank, jointly filled out the required paperwork to obtain sperm from an anonymous donor, and pursued

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[2] All further undesignated section references are to the Family Code.

[3] On December 15, 2008, Charisma filed a motion for sanctions against Kristina on the ground Kristina's appeal is frivolous. That motion is denied.

their goal of Kristina becoming pregnant through in-home artificial insemination. Charisma assisted Kristina in the insemination process. The couple kept a joint journal regarding the process, in which Kristina was referred to as "mommy" and Charisma was referred to as "momma."

After five months of attempts at in-home insemination, Charisma ordered two additional vials of sperm in early July 2002. On the evening of July 8, Charisma used one vial to inseminate Kristina at home; the next morning Kristina took the second vial to a doctor who inseminated her through intrauterine insemination. One of these two inseminations resulted in Kristina becoming pregnant.

Amalia was born in April 2003. Charisma was present for the birth and cut the umbilical cord. On the birth certificate, signed by Kristina, Amalia was given a hyphenated last name that was a combination of Charisma's and Kristina's last names. The couple brought Amalia into their home and shared parenting responsibilities for the first six weeks of her life. At that point, Kristina

returned to work and Charisma cared for Amalia full-time during the day; she also provided care at night.

In July 2003, approximately seven weeks after Kristina returned to work, she moved out of the home she shared with Charisma, taking Amalia with her. Since then, and before the trial court ordered reunification in 2008, Kristina allowed Charisma to see Amalia on only two occasions in the summer of 2003. In the summer of 2005, Kristina moved to Texas with Amalia.[4]

In May 2004, Charisma filed a petition to establish a parental relationship with Amalia. The trial court denied the petition, concluding that Charisma lacked standing to bring the action under the Uniform Parentage Act (UPA) (§ 7600 et seq.). (*Charisma R. v. Kristina S.* (2006) 140 Cal.App.4th

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[4] Kristina also terminated her domestic partnership with Charisma in July 2003, rendering inapplicable section 297.5, subd. (d), which gives domestic partners rights and responsibilities with respect to each others' children. (§ 299.3, subd. (a); see also *K.M. v. E.G.* (2005) 37 Cal.4th 130, 153 (dis. opn. of Werdegar, J.).)

301, 303 (*Charisma I*).) Charisma appealed, and this court reversed in June 2006, concluding that Charisma had standing to establish parentage under the UPA despite the fact that she lacked a biological relationship to Amalia. (*Charisma I*, at pp. 303-304, citing *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119-120 (*Elisa B.*). Because the trial court did not have the benefit of the *Elisa B.* decision at the time of its initial ruling, this court remanded the matter to the trial court for a determination, in light of *Elisa B.*, whether Charisma is a presumed parent under section 7611(d) and, if so, whether this is an appropriate case in which to rebut the parentage presumption. (*Charisma I*, at pp. 304, 307.)

On remand, the trial court found that Charisma is a presumed parent and that the presumption had not been rebutted. The court appointed custody evaluators who reported that adoption of a reunification plan would be appropriate. In May 2008, the court adopted a plan for gradual reunification of Charisma and Amalia

through joint therapy sessions in Texas with a court-appointed therapist.

DISCUSSION

I. *Substantial Evidence Supports the Trial Court's Finding that the Section 7611(d) Parentage Presumption is Applicable*

Under the UPA, an "interested person" may bring an action to determine the existence or nonexistence of a mother and child relationship. (§ 7650, subd. (a).) Section 7611(d) provides that a man is presumed to be the father of a child if he "receives the child into his home and openly holds out the child as his natural child." As explained in *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1050-1051, "An unwed father's rights and duties . . . substantially depend on whether he is a 'presumed father' within the meaning of section 7611. [Citations.] . . . [T]o become a presumed father, a man who has neither married nor attempted to marry his child's biological mother must not only openly and publicly admit paternity, but must also *physically* bring the child into his home." (See also *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652 (*Spencer W.*).) In *Elisa B.*,

supra, 37 Cal.4th at pages 119-120, 125-126, the court held that a biological mother's former same sex partner may be declared a presumed parent under a gender-neutral application of section 7611(d). (See also *Charisma I*, *supra*, 140 Cal.App.4th at p. 304.)

In *Elisa B.*, the El Dorado County District Attorney filed a complaint to establish that Elisa was the parent of twins born to her former partner, Emily, and to order Elisa to pay child support. Elisa denied she was the children's parent. (*Elisa B.*, *supra*, 37 Cal.4th at p. 113.) It was undisputed that Elisa participated in the artificial insemination of Emily with the understanding that they would raise the resulting child or children as coparents, and they did in fact coparent the children in a common family home for over one and one-half years. (*Id.* at pp. 114-115, 122.) The court pointed out that section 7650, subdivision (a), states that provisions applicable to determining a father and child relationship shall be used to determine a mother and child relationship " 'insofar as practicable,' " and concluded Elisa could be

considered a presumed parent under section 7611(d). (*Elisa B.*, at pp. 119-120.) The case was not "an appropriate action" to rebut the presumption of parentage with evidence that there was no biological relationship between Elisa and the twins,[5] because to allow the presumption to be so rebutted would be contrary to the public policy favoring a child having two parents to provide emotional and financial support. (*Id.* at pp. 122-125; see also *Charisma I, supra*, 140 Cal.App.4th at pp. 304-307.)

On remand from *Charisma I, supra*, 140 Cal.App.4th 301, Charisma bore the burden of proving she is a presumed parent under section 7611(d) by a preponderance of the evidence. (*Spencer W., supra*, 48 Cal.App.4th at pp. 1652-1653; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585-586.) On appeal, we review the trial court's determination under the

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[5] Section 7612, subdivision (a), provides that "a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence."

substantial evidence standard: "[W]e are bound to uphold [the trial court's judgment] so long as the record is free from prejudicial error and the judgment is supported by evidence which is 'substantial,' that is, of '"ponderable legal significance,"' '"reasonable in nature, credible, and of solid value . . . ."' [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "Under that standard, we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the judgment. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own

inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. [Citations.]" (*Id.*, at pp. 630-631.)

A. ***Kristina's Evidentiary Objections***

Kristina objected below to aspects of declarations filed by Charisma, on the grounds of lack of personal knowledge and lack of foundation. However, the trial court never ruled on her objections. Where a party fails to obtain a ruling from the trial court, the objections generally are not preserved on appeal. (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 801, fn. 1.) Appellate courts sometimes decline to apply that rule where the party unsuccessfully pressed for a ruling below,

but Kristina failed to do so in this case.[6] (See *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1580 [party orally requested a ruling and obtained "a blanket ruling of sorts"]; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 785 [party made two oral requests for rulings].) Citing *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, Kristina argues this court may consider her objections even though she failed to obtain a ruling below. However, that case held only that reviewing courts may consider evidentiary objections for the first time on appeal where the lower court "disposed of the motion on a legal ground not requiring a consideration of the evidence presented." (*Id.* at p. 656.) The court acknowledged the general rule that a party forfeits objections to evidence where the party fails to obtain a ruling from the trial court. (*Id.* at p. 655.)

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[6] Kristina asserts she asked the trial court for a written ruling at the December 2006 hearing. In fact, her counsel simply asked whether there would be a written ruling regarding the court's findings in general; there was no specific request related to the evidentiary objections.

Because the trial court actually and necessarily considered the evidence presented, Kristina's objections have been forfeited.

In any event, the specific evidentiary objections asserted on appeal are either without merit or relate to evidence unnecessary to support the trial court's judgment. Kristina argues there is no basis to conclude she authored or authorized a birth announcement e-mail, but the announcement is relevant to show that Charisma held out Amalia as her child, regardless of Kristina's participation or knowledge. Kristina argues there was inadequate foundation to admit various e-mails and postings from internet chat rooms, mostly related to the efforts to conceive Amalia, and that various declarants made assertions about care Charisma provided for Amalia without personal knowledge. However, as discussed below, the record provides overwhelming support for the trial court's findings that Charisma actively participated in Amalia's conception and cared for Amalia following her birth, including averments in Charisma's declaration and Kristina's own admissions.

Accordingly, Kristina was not prejudiced by any error in admitting the challenged evidence below.

B. ***Charisma's Claim to Presumed Parent Status Is Not Defeated by the Limited Duration of her Parenting of Amalia***

Kristina argues that Charisma did not parent Amalia for a sufficient period of time to satisfy section 7611(d).

Whether section 7611(d) requires Charisma to show she parented Amalia for an extended duration is a question of statutory interpretation we decide de novo. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.) The primary objective in statutory interpretation is to determine and give effect to the underlying legislative intent. (Code Civ. Proc., § 1859.) We begin by examining the statutory language, giving the words their usual, ordinary meanings and, if possible, giving each word and phrase significance. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063; *Young v. Gannon* (2002) 97 Cal.App.4th 209, 223.) "If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain

meaning of the language governs." (*Estate of Griswold* (2001) 25 Cal.4th 904, 911.) Section 7611(d), read gender-neutrally (*Charisma I, supra*, 140 Cal.App.4th at p. 304), provides that a man or woman is presumed to be a natural parent of a child if "[he or she] receives the child into [his or her] home and openly holds out the child as [his or her] natural child." On its face, the statute contains no durational requirement; it does not, for example, state that the child must be received or held out "for a significant period of time."

Without deciding the issue before this court, prior decisions have addressed the durational issue in defining the term "receives." The use of "receives" in section 7611(d) has its origins in Civil Code former section 230, which addressed the adoption of an illegitimate child by the father. That section provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon

deemed for all purposes legitimate from the time of its birth." (Civ. Code, former § 230, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.) When the Legislature enacted the UPA in 1975, it replaced the concept of legitimacy with the concept of parentage and replaced Civil Code former section 230 with the language now in section 7611(d). (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827-828 (*Kelsey S.*).)[7]

The court in *Kelsey S.* addressed the "receiving" requirement, both pre-UPA and post-UPA. In that case, the alleged father[8] did not

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[7] *Kelsey S., supra,* 1 Cal.4th 816 involved Civil Code former section 7004, subdivision (a)(4) (added by Stats. 1975, ch. 1244, § 11, and repealed by Stats. 1993, ch. 219, § 63), which was identical to section 7611(d). Civil Code former section 7004 was repealed and replaced by sections 7611, 7611.5 and 7612 without substantive change. (See *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1116, fn. 3.)

[8] "A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an 'alleged' father.

physically receive the child into his home because the birth mother sought to put the child up for adoption. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 825.) The court considered the alleged father's argument that "constructive receipt [of the child] is sufficient when the mother prevents actual receipt." (*Id.* at p. 828.) The court rejected that argument as a matter of statutory interpretation, because the plain language of the statute contemplates "actual" receipt rather than "attempted receipt or constructive receipt." (*Id.* at pp. 826, 830.) In the course of its analysis, the court discussed a pre-UPA case, *In re Richard M.* (1975) 14 Cal.3d 783, which suggested that constructive receipt might be sufficient. (*Kelsey S.*, at pp. 827-828.) *Kelsey S.* declined to adopt that suggestion, pointing out that in *Richard M.* the father "had in fact received the child into his home, albeit briefly. The court therefore was not faced with the question before us, i.e., whether constructive receipt is sufficient when

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[Citation.]" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.)

the mother prevents actual receipt." (*Kelsey S.*, at p. 828.)

Kelsey S. also pointed out that under the pre-UPA scheme there was a policy of liberal construction in favor of finding legitimation, so that children did not end up without a legal father. (*Kelsey S., supra,* 1 Cal.4th at pp. 828-829.) The court stated there was no need to "strain" to find a father through the doctrine of constructive receipt because in the case before it there were two competing fathers, so the child would end up with a legal father in any event. (*Ibid.*) Although the court declined to liberally construe the requirement in the case before it,[9] the court did not suggest that actual receipt of a child *for a significant duration* is required. To the contrary, the court discussed *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, in which the biological father sought *temporary* custody of the child in order to establish his

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9 We need not decide whether liberal construction would be appropriate in the present case, where Amalia will be left without a second legal parent if Charisma is not a presumed parent.

presumed parentage claim. The court favorably quoted the decision as follows: " 'Michael is a natural father, not a presumed father, because he has not yet received Eric [the child] into his home. [Citation.] If, however, he actually acquired physical custody, he could receive Eric into his home and thereby acquire the status of a presumed father. [Citations.] . . . Thus the present controversy, although nominally about the temporary custody of Eric pending the adoption proceeding, will probably determine the fate of the proposed adoption.' " (*Kelsey S.*, at p. 829, quoting *Michael U.*, at p. 791; see also *Kelsey S.*, at p. 842 [stating that the superior court had "the authority to grant petitioner custody of his child so that he could qualify as a presumed father"].) The clear implication is that the "receiving" requirement is a necessary formality, but not one that requires "receipt" for any particular duration.

Moreover, as previously mentioned, the use of the term "receives" in section 7611(d) originates in the use of the term "receiving" in Civil Code former section 230. As *Kelsey S.* explained, under

the pre-UPA cases it was sufficient if the alleged father "briefly" received the child into the home. (*Kelsey S.*, *supra*, 1 Cal.4th at pp. 827-828.) We presume the Legislature was aware of the judicial interpretations of the receiving element at the time it adopted the UPA. (*People v. Harrison* (1989) 48 Cal.3d 321, 329 [the Legislature "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.] Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction. [Citation.]"].) If the Legislature had intended to require an alleged parent to live with a child for an extended period of time, it would likely have used a different term than "receives" or added an express durational requirement. But Kristina presents no analysis of the statutory language or legislative history supporting a conclusion that the Legislature intended so fundamental a change.

None of the cases Kristina cites suggests section 7611(d) imposes a durational requirement to obtain presumed parent status. In *Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1219-1221, two men had competing claims for presumed father status; the court referred to the duration of one man's parenting, but did not suggest there is a durational requirement. *County of Los Angeles v. Sheldon P.* (2002) 102 Cal.App.4th 1337, 1344-1345, also referred to the duration of one man's parenting in comparing two alleged fathers. The court in *Miller v. Miller* (1998) 64 Cal.App.4th 111 did not emphasize the duration of parenting in applying section 7611(d). In that case, a man was denied presumed parent status because he had not clearly held the child out as his own and because there was a conclusive presumption that the mother's former husband was the father. (*Miller*, at pp. 118-119.) In *Spencer W.*, *supra*, 48 Cal.App.4th 1647, the man seeking presumed father status was "equivocal in asserting his parental relationship" and left the home once the mother stopped supporting him. (*Id.* at pp. 1651,

1653-1654.) In *In re T.R.* (2005) 132 Cal.App.4th 1202, the man seeking presumed father status was found to have molested the child. (*Id.* at pp. 1211-1212.) The court in *In re Nicholas H.* (2002) 28 Cal.4th 56, 70, addressed rebuttal of the parentage presumption, not the requirements of section 7611(d).

In re A.A. (2003) 114 Cal.App.4th 771, 786, does characterize cohabitation for a period of "one to three months" as "exceedingly small," but it does not suggest that section 7611(d) contains a durational requirement. Instead, the court reversed the trial court's presumed parenthood finding because the evidence supporting the finding was "secondhand," the minor did not live with or visit the alleged father in the man's own home, and there was little evidence the man held himself out as the minor's father. (*In re A.A.*, at pp. 786-787.) Moreover, *In re A.A.* ultimately adopted an expansive interpretation of the "receives" requirement, in holding the trial court erred in refusing to find a second man a presumed father, even though the minor never actually lived with

the man. The court reasoned: "The record is clear that the minor never actually lived with R.B. However, when a mother and father of a child are not inclined to live with each other, their child often lives with only one of the parents and visits the other. . . . Although the minor was not received into R.B.'s home to live with him on a full-time basis, he was involved with the minor from the very beginning, with Mother's blessing. He took this interest in the minor even though he was not convinced she is his biological daughter. Thus, when his own son, R., came to visit him, so also did the minor child, whom the record shows was bonded with R." (*Id.* at p. 784.)

Lacking authority supporting her interpretation, Kristina essentially asks us to "judicially rewrite the statute" to impose a durational requirement that is absent from the plain language of section 7611(d); that we cannot do. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 830.) We conclude that receipt of the child into the home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of the

relationship, but it need not continue for any specific duration. This conclusion is consistent with the public policy favoring a child having two parents to provide emotional and financial support, which prior courts have emphasized in interpreting the UPA. (*Elisa B.*, *supra*, 37 Cal.4th at p. 123; see also *Librers v. Black* (2005) 129 Cal.App.4th 114, 123 ["whenever possible, a child should have the benefit of *two* parents to support and nurture him or her"].) Although cohabitation for an extended duration may strengthen a claim for presumed parent status, section 7611(d) does not require that cohabitation or coparenting continue for any particular period of time.[10]

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[10] Because Charisma received Amalia into her home within the meaning of section 7611(d), we need not address Charisma's argument that section 7611(d) would violate her constitutional rights to the extent it allowed Kristina to prevent Charisma from becoming a presumed parent where Charisma has demonstrated as well as she can under the circumstances a full commitment to her parental responsibilities. (See *Kelsey S.*, *supra*, 1 Cal.4th at pp. 837, 844, 849; *In re Jerry P.* (2002) 95 Cal.App.4th 793, 812-817.) And we need not consider whether Kristina should be precluded

C. *Substantial Evidence Supports the Trial Court's Findings that Charisma Received Amalia into her Home and Openly Held Out Amalia as her Natural Child*

In addition to arguing that Charisma did not parent Amelia for a sufficient duration, Kristina more generally challenges the sufficiency of the evidence to support the trial court's findings that Charisma received Amalia into her home and openly held out Amalia as her natural child, as required to establish presumed parentage under section 7611(d).

As relevant to the "receives" element, after Amalia's birth in April 2003, Charisma and Kristina brought Amalia into their apartment and shared parenting responsibilities for the first six weeks of her life. For the next seven weeks,

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under the doctrine of equitable estoppel from relying on the limited duration of cohabitation to defeat Charisma's claim to presumed parental status. (See *Kelsey S.*, at p. 853 (conc. & dis. opn. of Mosk, J.); see also *Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.) Future courts may be confronted with these issues if a birth mother has prevented an alleged parent from satisfying the requirements of section 7611(d), but we are not.

Charisma cared for Amalia full-time during the day, and also provided care at night. Kristina seems to suggest that the apartment was not Charisma's home because there is no evidence both of their names were on the lease. However, she presents no authority or reasoned argument that Charisma needed to present such proof to satisfy section 7611(d). Substantial evidence shows the apartment was Charisma's home: Kristina in her declaration averred they shared an apartment for almost five years and the apartment was "our common residence;" Charisma referred to the apartment as their "shared" home and averred they obtained renter's insurance in both their names; and the apartment manager averred they lived there together. Kristina disputes the amount and quality of Charisma's care of Amalia and contributions to the household. But, as the trial court reasoned, "there may be disagreements or discrepancies between the parties as to how much care was given by [Charisma] or the quality of that care. The court does not particularly find that to be relevant in terms of whether or not she, in fact,

received the child into her home. It is clear to the court from the evidence that was submitted that [Charisma] did care for the child after the child was born."[11]

The following evidence showed that Charisma openly held Amalia out as her natural child:[12] Charisma was present during Amalia's birth and cut the umbilical cord; she gave Amalia a hyphenated last name including her name on Amalia's birth certificate; she brought Amalia into her and Kristina's shared home; she held herself out as Amalia's mother in a birth announcement, a baby shower, a gift registry, an online message

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[11] Charisma's averments on this issue are corroborated in part by a declaration from the apartment manager who had personal knowledge of the care provided by Charisma during the day because she visited with Charisma and Amalia in her apartment after Kristina returned to work.

[12] Notably, Charisma's lack of biological connection to Amalia does not mean that she could not hold Amalia out as her "natural" child. (*Elisa B.*, *supra*, 37 Cal.4th at p. 126 [" 'natural' as used in the UPA does not always mean 'biological' "].) Kristina does not argue to the contrary.

board for women trying to conceive, and communications with various people, including the nurse at a "well baby" visit, a visiting former co-worker, and strangers in the street; she shared in the care of Amalia until Kristina went back to work; and she cared for Amalia after Kristina returned to work until Kristina moved out with Amalia.

Clearly, Kristina is mistaken in asserting the evidence showed only that Charisma "told a few people that [Amalia] was 'her baby.' " The evidence showed that Charisma openly and publicly asserted her parentage in various forums and to numerous people. Kristina points to no evidence demonstrating any equivocating on the part of Charisma regarding her parentage (cf. *Spencer W.*, *supra*, 48 Cal.App.4th at pp. 1651, 1653-1654), and she presents no authority or reasoned argument that any particular number or sorts of public acknowledgements are necessary to satisfy section 7611(d).

Instead of discussing the particular facts showing that Charisma received Amalia into her

home and held her out as her natural child, Kristina argues broadly that Charisma failed to present sufficient evidence of a parental relationship to qualify as a presumed parent under section 7611(d). She cites *In re T.R.*, where the court stated: "In determining whether a man has 'receiv[ed] a child into his home and openly h[eld] out the child' as his own [citation], courts have looked to such factors as whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental. [Citations.]" (*In re T.R.*, *supra*,

132 Cal.App.4th at p. 1211.) *In re T.R.* does not require an alleged parent to show each and every one of these factors exists. Instead, it lists the types of factors trial courts may consider. In this case, the trial court considered the appropriate factors in determining that Charisma is a presumed parent and there was ample evidence of a parental relationship between Charisma and Amalia to support the trial court's determination.[13]

Kristina's attempt to analogize this case to *Spencer W.* fails. In that case, the alleged father, Leonard, lived with the mother at the time of the birth but not at the time of conception. (*Spencer W.*, *supra*, 48 Cal.App.4th at p. 1650.) It was unclear who the biological father was because the mother was a prostitute at the time of conception. (*Ibid.*) Leonard was present at the child's birth,

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[13] Kristina's citations to *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932 (*Dawn D.*), and *Brian C. v. Ginger K.*, *supra*, 77 Cal.App.4th 1198 are inapposite. In each case the court was confronted with two competing fatherhood claims.

and lived with the child and the mother for two years. (*Ibid.*) During that time, Leonard told some people he was the father, the child called him "daddy," and Leonard cared for and disciplined the child. (*Id.* at pp. 1650-1651.) However, Leonard did not have his name placed on the birth certificate and he "was equivocal in asserting his parental relationship" while they lived together. (*Ibid.*) In particular, when a social worker visited the apartment, Leonard specifically told the worker he was not the child's father. (*Id.* at p. 1651.) He cared for the child for two months while the mother was incarcerated, but when the mother stopped receiving welfare payments during another period of incarceration, Leonard separated from her and left the child with a friend of the mother. (*Ibid.*) The Court of Appeal affirmed the trial court's rejection of Leonard's presumed parentage claim, concluding that "[t]he evidence permitted the conclusion that Leonard did not receive the child into *his* home, but instead that mother permitted Leonard to reside in *her* home, and that Leonard's residence with [the child] was not demonstrative of

Leonard's commitment to the child but reflected that Leonard acted out of personal convenience and self-interest." (*Id.* at p. 1653.) The court also concluded that "a trier of fact could conclude Leonard's actions, as a whole, were not sufficient to satisfy the requirement that Leonard '*openly and publicly* admit paternity.' [Citation.]" (*Id.* at pp. 1653-1654.) The present case is unlike *Spencer W.* The record overwhelmingly supports the trial court's findings that Charisma welcomed Amalia into her shared home with Kristina and consistently acknowledged her parental relationship and responsibilities to the child.

We also reject Kristina's attempt to analogize this case to *In re Sarah C.* (1992) 8 Cal.App.4th 964 (*Sarah C.*). There, the child was the product of an extramarital affair between the mother and the alleged father, Paul. (*Id.* at p. 969.) Although Paul told "a few friends" and family that he was the biological father, he did not assist the mother during the pregnancy, did not seek to have his name listed on the birth certificate (which listed the mother's husband's name), and did not inform

the mother's husband of the child's biological paternity. (*Id.* at pp. 972-973.) The Court of Appeal concluded the evidence supported the trial court's finding that Paul was not a presumed father. (*Id.* at p. 973.) In contrast, the evidence in this case uniformly showed Charisma held Amalia out as her natural child at every appropriate opportunity.

It is important to note that in the two cases Kristina principally relies upon, *Spencer W.* and *Sarah C.*, the Courts of Appeal were reviewing trial court decisions *rejecting* presumed parentage claims. (*Spencer W.*, *supra*, 48 Cal.App.4th at pp. 1653-1654; *Sarah C.*, *supra*, 8 Cal.App.4th at p. 973.) Accordingly, the reviewing courts were obliged to make all inferences in favor of the trial court findings that the alleged fathers had *not* established their presumed parentage claims. In this case, we are obliged to make all factual inferences in favor of the trial court's finding that Charisma made the showing required by section

7611(d). That finding is amply supported by the evidence in the record.[14]

II. ***The Trial Court Did Not Abuse Its Discretion in Concluding There Is no Basis to Rebut the Parentage Presumption in this Case***

Section 7612, subdivision (a), provides that "a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence." Thus, Kristina bore the burden below of rebutting the presumption that Charisma was Amalia's parent with clear and convincing evidence. (*Comino v. Kelley* (1994) 25 Cal.App.4th 678, 685.) The determination of whether the presumption has been rebutted is

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[14] It is frivolous for Kristina to assert that extending presumed parent status to Charisma would justify extending such status to babysitters, nannies, or other home caretakers. Among other things, such persons would not have engaged in a joint effort to conceive a child in a committed romantic relationship, would not have their last name attached to the child on the birth certificate, and would not be able to hold themselves out as the child's mother without strenuous objection from the biological mother and her relatives.

within the discretion of the trial court. (*Elisa B.*, *supra*, 37 Cal.4th at p. 122.)

In an appropriate case, clear and convincing evidence that an alleged parent has no biological tie to the child may defeat presumed parent status. (See *Elisa B.*, *supra*, 37 Cal.4th at p. 120.) In *Elisa B.*, the court concluded the case was "not 'an appropriate action' in which to rebut the presumption of presumed parenthood with proof that Elisa is not the twins' biological parent." (*Id.* at p. 122.) The court stated it was unnecessary to remand to permit the superior court to exercise its discretion because it would have been an abuse of discretion to conclude the presumption could be rebutted because Elisa "actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent." (*Id.* at p. 122; see also *id.* at p. 125.)

In *Charisma I*, this court instructed the trial court that, if it found Charisma is a presumed parent of Amalia under section 7611(d), it should then determine whether the facts identified in *Elisa B.* on the rebuttal issue are true. We explained: "If the trial court finds that Charisma is a presumed parent and finds true all of the facts outlined in *Elisa B.* on the rebuttal issue, those findings support a conclusion that this is not an appropriate case to allow rebuttal of the presumption of Charisma's parenthood; in other words, the evidence that she has no biological tie to Amalia does not rebut the presumption. Absent other facts justifying rebuttal of the presumption [citation], any other conclusion would be an abuse of discretion. [Citation.]" (*Charisma I, supra*, 140 Cal.App.4th at p. 307.)[15]

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[15] We also cautioned that "If not all the facts outlined by *Elisa B.* are present, then the trial court should exercise its discretion with regard to the rebuttal issue based on the evidence and arguments. It may be that not all of the facts emphasized in *Elisa B.* are necessary to a finding that the presumption cannot be rebutted by the

A. *Substantial Evidence Supports the Trial Court's Determination that the* Elisa B. *Factors Are Present in this Case*

The trial court made findings on the *Elisa B.* factors to support its conclusion that Kristina had failed to rebut the presumption of parenthood under section 7611(d).[16] Substantial evidence supports the trial court's finding that Charisma actively participated in Amalia's conception with the understanding she would parent Amalia with Kristina. Charisma and Kristina were in a romantic relationship and registered domestic partners in California at the time Amalia was conceived. After the couple decided to have children, they contacted a sperm bank and jointly filled out the required paperwork to obtain sperm

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lack of a biological tie to the child. Or it may be that there are different facts that justify such a finding." (*Charisma I, supra,* 140 Cal.App.4th at p. 308.) The trial court was not confronted with those considerations because it found all the facts outlined by *Elisa B.* present in this case.

[16] Kristina does not dispute that there are no competing claims to being Amalia's second parent.

from an anonymous donor. The sperm bank's "Patient Registration Form" lists Kristina as the patient and Charisma as her "Spouse☐/Partner☐," and indicates they are registered domestic partners. The couple provided Charisma's credit card information for billing purposes and both women signed the form. Both Charisma and Kristina signed a consent form for therapeutic insemination and a release form for home insemination. Charisma completed the sperm bank's "Donor Selection Form" listing donor choices and both women's physical characteristics. Charisma placed two of the orders for sperm (there were three orders in total), one of which included the sperm that impregnated Kristina.

For five months, Charisma actively participated in Kristina's in-home artificial insemination efforts.[17] The couple kept a joint

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[17] The trial court found it was impossible to determine whether Amalia's conception occurred due to one of the home insemination attempts or due to a final attempt at the doctor's office, because the final home attempt occurred the evening before the doctor's attempt. In the circumstances of this

journal regarding the process, in which Kristina was referred to as "mommy" and Charisma was referred to as "momma." In the journal both women describe their excitement at the prospect of parenthood. The journal also contains statements such as "We decided to try to inseminate today." In another entry, Charisma describes in detail her effort to learn how to perform the insemination and how she "blundered" the first attempt. After Kristina became pregnant, her mother addressed e-mails to Charisma and Kristina to "the mommies." Charisma communicated with her co-worker, a co-worker of Kristina's, an online community of other women trying to conceive, and others regarding her and Kristina's efforts to have a child.

Kristina disregards this overwhelming body of evidence in asserting that "the trial court substantially relied upon statements in emails made and postings from online chat rooms" without evidence of Kristina's authorship. And, despite

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case, it is not important to our analysis whether actual conception occurred during one of the home attempts with Charisma's assistance.

Kristina's protestations, even these postings are relevant to Charisma's understanding and intentions. Even absent these postings, substantial evidence plainly supports the trial court's finding. As in *Elisa B.*, *supra*, 37 Cal.4th at page 123, Charisma "actively assisted [Kristina] in becoming pregnant with the expressed intention of enjoying the rights and accepting the responsibilities of parenting the resulting" child.

Substantial evidence also supports the trial court's finding that Charisma voluntarily accepted the rights and obligations of parenthood after Amalia was born: She was present during Amalia's birth and cut the umbilical cord; she gave Amalia a hyphenated last name including her name; she brought Amalia into her home; she held herself out as Amalia's mother to various people in various forums; she shared in the care of Amalia until Kristina went back to work; and she cared for Amalia after Kristina returned to work until Kristina moved out with Amalia. Kristina concedes that Charisma "watched" Amalia after she returned to work, but she disputes the amount and

quality of Charisma's care and contributions to the household. We must accept the trial court's resolution of this factual dispute. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at pp. 630-631.)

Again, an underlying theme of Kristina's argument is that the trial court should have found the parentage presumption rebutted because Charisma did not parent Amalia for a long period of time. While the duration of parenting could be relevant to the rebuttal analysis, there is no specific durational requirement. Kristina points out that in *Elisa B.*, *supra*, 37 Cal.4th at pages 114-115, 123, the alleged parent played a substantial parental role for years. However, the court did not suggest it would be appropriate to rebut the parentage presumption solely because there is no lengthy period of parenting. In fact, the court's holding omits any reference to a durational requirement. Of the three factors outlined by the court, only the "voluntarily accepted the rights and obligations of parenthood" factor (*id.* at p. 125) is one in which duration could arguably be of any

relevance. But, despite the fact that Elisa had parented the children for years, the Supreme Court elected not to describe the factor with language including a temporal dimension, such as "for a significant period of time."[18] Moreover, it is undisputed that it was Kristina's unilateral conduct in moving out with Amalia that prevented Charisma from parenting Amalia for a longer period of time. Accordingly, this is not a case where the short duration of parenting reflects negatively on an alleged parent's commitment to

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[18] *In re Nicholas H.*, *supra*, 28 Cal.4th 56, *In re Jesusa V.* (2004) 32 Cal.4th 588, and *Steven W. v. Matthew S.*, *supra*, 33 Cal.App.4th 1108, on which Kristina relies, are inapposite on this issue. All precede *Elisa B.* and offer no guidance on the rebuttal factors outlined in the case. Moreover, in *Nicholas H.* the duration of parenting was not important; the court rejected as a matter of statutory interpretation an argument that the alleged father's lack of biological connection to the child necessarily rebutted his parentage claim. (*Nicholas H.*, at pp. 58-59.) In *Jesusa V.* and *Steven W.*, the courts discussed the duration of parenting in order to justify recognizing the claim of one alleged father over that of another. (*Jesusa V.*, at pp. 608-609; *Steven W.*, at pp. 1115-1117.)

establishing a parental relationship. The relatively short period that Charisma parented Amalia is not alone a basis to rebut the parentage presumption.[19]

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[19] Kristina asserts a two-year cohabitation standard to establish parentage is adopted in the American Bar Association Model Act Governing Assisted Reproduction Technology (Feb. 2008) section 604 (<http://www.abanet.org/family/committees/artmodelact.pdf> [as of June 26, 2009]) (hereafter Model Act). In fact, the Model Act is consistent with this decision. It provides: "An individual who provides gametes for, or consents to, assisted reproduction by a woman as provided in Section 604 with the intent to be a parent of her child is a parent of the resulting child." (Model Act, § 603.) Section 604 of the Model Act specifies that "an individual who intends to be a parent of a child born by assisted reproduction" should sign a written consent, but that failure to sign such consent does "not preclude a finding of parentage if the woman and the intended parent, during the first two years of the child's life, resided together in the same household with the child and openly held out the child as their own." In light of the trial court's findings, there is no basis to conclude that Charisma would have failed to sign a consent to Kristina's assisted reproduction, had the legal regime embodied in the Model Act been in effect at that time. In fact, Charisma *did* sign the sperm bank's "Patient

The trial court's decision is well-supported by the evidence.

B. *The Trial Court Did Not Abuse Its Discretion in Concluding that no Other Facts Justified Rebuttal of the Parentage Presumption*

In *Charisma I, supra*, 140 Cal.App.4th at page 307, this court indicated that rebuttal of the parentage presumption would not be an abuse of discretion, even if all the *Elisa B.* factors are present, if other facts justified rebuttal of the presumption. We cited *In re T.R., supra*, 132 Cal.App.4th at page 1212, in which the court concluded that conduct "antithetical" to the parental role can justify rebuttal of the presumption (*id.* at p. 1211).

Kristina argues the trial court erred in failing to find the presumption rebutted based on a single photograph of Amalia that Charisma posted online. The claimed objectionable photograph is one of dozens included in an online photo album. It

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Consent Form for Therapeutic Insemination," which may be sufficient to render her a parent under section 603 of the Model Act.

depicts a newborn, naked Amalia from the neck down, apparently in the hospital because of the presence of monitors and cords. The baby's genitalia are visible, although the photograph does not emphasize the genitalia. Kristina also refers in passing to two other photographs posted online, which depict her breastfeeding Amalia; one of Kristina's breasts is partially visible in both photographs. The circumstances of the online posting of the photographs are unclear. In a declaration, Charisma averred that she and Kristina jointly agreed to create an online photo album after the birth of Amalia, and that album was "the only place where we kept on-line photos of Amalia." The link to the album was shared only with family and friends, although others could find it if they searched by name.[20] Kristina averred that she was upset when she learned that the photographs were online and that she contacted the

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[20] Kristina asserts that Charisma linked to the photograph or album in an online chat room, but the cited portions of the record only reflect the posting on a message board of two unobjectionable photographs.

Newark Police Department, which requested that Charisma remove the pictures from the internet. Charisma complied. The breastfeeding photographs are not graphic and the photograph of Amalia is not child pornography.[21] At most Charisma demonstrated an isolated instance of poor judgment in including those photographs in a

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21 Kristina's argument that Charisma's conduct is similar to the parents in *In re Ulysses D.* (2004) 121 Cal.App.4th 1092, is meritless. There, the juvenile court found the parents had sexually abused their children by taking three photographs, including one in which the nude father appeared in a sexually suggestive situation with one of the children, who was also nude. (*Id.* at pp. 1095-1097.) The photographs at issue were on the same roll of film in which the mother posed in her panties; the photographs of the mother were admittedly taken as foreplay for the parents' sexual arousal. (*Id.* at p. 1097.) The court of appeal sustained the juvenile court's finding that the photographs were taken to "arouse themselves or others." (*Ibid.*) The photograph at issue in this case bears no resemblance to those at issue in *Ulysses D.*

large group of appropriate photographs posted online.[22]

The evidence presented by Kristina is not comparable to the evidence justifying rebuttal of the parentage presumption in *In re T.R.*, *supra*, 132 Cal.App.4th 1202. There, the alleged father, Marvin, was a registered sex offender who had been convicted of three counts of lewd conduct with 10-year-old and 13-year-old girls and sentenced to six years in prison. (*Id.* at pp. 1206-1207.) The minor was 10 years old and declared a dependent of the juvenile court based on an allegation that she was at substantial risk of being sexually abused due to Marvin's history of molesting other children and reports of his inappropriate conduct with the

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[22] Kristina also refers in passing to evidence she presented below suggesting that Charisma did not provide good care to Amalia. In her reply, Kristina specifically refers to a declaration from her mother, in which her mother avers that "one time" she saw Charisma attempt to feed Amalia by putting a tube down her throat and that she saw Charisma yelling angrily at Kristina while holding Amalia. The trial court described this evidence as differences of opinion regarding the quality of care provided by Charisma.

minor. (*Ibid.*)[23] The court concluded that, although the parentage presumption may have arisen based on Marvin's acting in a paternal role since the minor was three, the juvenile court did not err in concluding the presumption was rebutted by his conduct. (*Id.* at p. 1212.) The court emphasized that Marvin had deceived the minor's mother regarding his criminal convictions and the juvenile court had found true the allegations of molestation by clear and convincing evidence. (*Id.* at p. 1211.) "Marvin's conduct was antithetical to a parent's role and was a blatant violation of parental responsibilities. It more than counterbalanced the factors favoring Marvin's presumed father status." (*Ibid.*) Nothing comparable was presented to the trial court in this case. Kristina has not shown the court erred in

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[23] For example, the minor's older sister observed the minor lying over Marvin's lap with her pants and underwear around her ankles. (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1206.) The circumstances surrounding the inappropriate conduct were similar to those involved in Marvin's prior criminal offenses. (*Id.* at p. 1207.)

rejecting her suggestion to rebut the parentage presumption based on Charisma's alleged unsuitability as a parent.

Finally, Kristina contends extending presumed parent status to Charisma is not consistent with "the purposes of the parentage presumption." Kristina principally relies on *Elisa B.*, *supra*, 37 Cal.4th 108, where El Dorado County was seeking to force the alleged parent to provide financial support to the children. Kristina interprets *Elisa B.* too narrowly; the case does not suggest that lack of a present need for financial support justifies rebuttal of the presumption. The presumption furthers the general public policy favoring a child having "two parents, rather than one, as a source of both emotional and financial support." (*Id.* at p. 123; see also *Kristine H. v. Lisa R.*, *supra*, 37 Cal.4th at p. 166 [referring to "the public policy favoring that a child have two parents rather than one"]; *Kristine M. v. David P.* (2006) 135 Cal.App.4th 783, 788 ["[p]ublic policy and common sense endorse, where possible, creation of a legal parent and child relationship, with the

attendant responsibilities and privileges," fn. omitted]; *Librers v. Black*, *supra*, 129 Cal.App.4th at p. 123 ["whenever possible, a child should have the benefit of *two* parents to support and nurture him or her"].) It may be especially important to apply the presumption where the public would otherwise bear the support obligation (*Elisa B.*, at p. 123), but that is not a necessary condition to application of the presumption. It is reasonable to conclude Amalia will benefit, either now or in the future, from the additional financial and emotional support a second parent can provide, even if she would not otherwise become a public burden.[24]

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24 The other cases cited by Kristina, all of which involve the presumption that a man is the father of a child conceived by his wife during the marriage, are inapposite. *In re Lisa R.* (1975) 13 Cal.3d 636, 648-651, held that a man had a due process right to challenge the presumption, in part because the purposes served by the presumption were undermined by the death of the husband and wife. *County of Orange v. Leslie B.* (1993) 14 Cal.App.4th 976, 979-982, held the trial court properly declined to apply the presumption where it would allow the biological father to escape his support obligations and the purposes served by the

Kristina also contends it is inconsistent with the purposes of the presumption to extend presumed parent status to an individual who has not "demonstrated a commitment to creating a substantial familial relationship with a child." Assuming that to be true, the trial court found Charisma *did* demonstrate such commitment, and the court's findings are supported by substantial evidence. Kristina's additional argument that an extended period of parenting is necessary to demonstrate that commitment is not supported by section 7611(d) or the case law, as explained previously.

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presumption were undermined by the lack of a parental relationship between the child and the mother's former husband. (See also *Comino v. Kelley*, *supra*, 25 Cal.App.4th at p. 684 [presumption rebutted where there "is neither a marital union nor a family unit to preserve"].)

III. *Kristina's Constitutional Claims Are Without Merit*

A. *This Court Will Exercise Its Discretion to Decide the Constitutional Claims*

In *Charisma I, supra*, 140 Cal.App.4th at page 308, because this court remanded for further factual findings, we declined to address Kristina's claim "that it would violate her federal constitutional rights were we to conclude that Charisma is Amalia's parent under the [UPA]." Although Kristina raised those claims in the previous appeal, she failed to raise them on remand. Charisma contends the constitutional claims have been forfeited. (See, e.g., *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [" '[g]enerally, issues raised for the first time on appeal which were not litigated in the trial court are waived,' " fn. omitted].) On the other hand, "California courts have held that constitutional issues can be raised for the first time on appeal in various circumstances. [Citation.]" (*Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1476 (*Bonner*), disapproved on another ground in

Katzberg v. Regents of University of California (2002) 29 Cal.4th 300, 320-321.)

Typically, courts exercise their discretion to allow issues to be raised for the first time on appeal when "the issue is purely legal and presented to [the court] on undisputed facts, and involves a matter of public interest." (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73.) In this case, the parties do dispute the facts regarding the conception and parenting of Amalia, and those facts are relevant to Kristina's as-applied challenge to section 7611(d). However, the factual determinations relevant to Kristina's challenge are encompassed within the trial court's findings that Charisma is a presumed parent and the presumption should not be rebutted. Accordingly, resolution of the constitutional claims requires only that we apply the law to the facts found by the trial court; in these circumstances, we have discretion to consider the claims. (See *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 391, fn. 10 [new legal claim properly considered on appeal where relevant evidence was

"fully presented to the trial court"]; cf. *People v. Williams* (2008) 43 Cal.4th 584, 625 [claim forfeited where there is a "critical factual dispute that the trial court never was asked to explore or resolve"].) There is no unfairness to Charisma in considering Kristina's constitutional claims because Charisma already had full opportunity and incentive to develop the relevant factual record. As in *Bonner*, *supra*, 45 Cal.App.4th at page 1477, "the question is one of pure law presented in a context where . . . the factual situation is no 'different from that established by the evidence in the trial court.' [Citation.]"

Because Kristina's constitutional claims are a matter of substantial public interest in this rapidly evolving area of family law, we exercise our discretion to decide the claims presented by Kristina on appeal in light of the trial court's factual findings.

B. *Kristina's Equal Protection Claim is Without Merit*

Kristina contends the trial court's order violates the federal and state constitutional

guarantees of equal protection because she was accorded disparate treatment on the basis of gender. "Broadly stated, equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws . . . enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness.' [Citation.] In determining whether such a deprivation has occurred, the court's ultimate task is to examine the validity of the underlying purpose, and the extent to which the disputed statutory classification promotes such purpose. [Citations.]" (*People v. Wutzke* (2002) 28 Cal.4th 923, 943.) "As a foundational matter, however, all meritorious equal protection claims require a showing that 'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citation.] In other words, 'neither the Fourteenth Amendment of the Constitution of the United States nor the California Constitution [citations] precludes classification by the Legislature or requires uniform operation of the

law [for] persons who are different . . . "with respect to the legitimate purpose of the law." ' [Citations.]" (*Id.* at pp. 943-944.)

Kristina's argument she was accorded disparate treatment on the basis of gender rests on two Court of Appeal decisions in which men were denied presumed parent status, *Spencer W.*, *supra*, 48 Cal.App.4th 1647 and *Sarah C.*, *supra*, 8 Cal.App.4th 964. Kristina contends she is "similarly situated to the mothers in those cases" and she "was accorded disparate treatment because of the sex of her ex-partner." (Boldface type omitted.)

We have already rejected Kristina's attempt to analogize this case to *Spencer W.* and *Sarah C.* To summarize, in *Spencer W.*, the alleged father did not have his name placed on the birth certificate, he was "equivocal" in acknowledging his paternity, and he abandoned the child when the mother stopped supporting him. (*Spencer W.*, *supra*, 48 Cal.App.4th at pp. 1650-1651.) In *Sarah C.*, the alleged father did not assist the mother during the pregnancy, did not seek to have his

name listed on the birth certificate, and did not inform the mother's husband of his paternity claim. (*Sarah C., supra,* 8 Cal.App.4th at pp. 972-973.) For the reasons stated previously, the present case is distinguishable from *Spencer W.* and *Sarah C.*

Kristina has not shown that a similarly situated biological mother opposing a petition to establish presumed parentage would be treated differently under the law if the alleged parent, lacking a biological connection to the child, were a man instead of a woman. In other words, Kristina has not shown that a case involving a man in Charisma's circumstances would be decided any differently under the law. (See *Elisa B., supra,* 37 Cal.4th at p. 129 (conc. opn. of Kennard, J.) [pointing out that a man similarly situated to the non-biological mother in the case also would have been declared a presumed parent].) Kristina's equal protection claim is without merit.

C. *Kristina's Due Process Claim is Without Merit*

Kristina contends the trial court's ruling, declaring Charisma a presumed parent "over

[Kristina's] objections as the fit biological mother," violated her federal and state constitutional rights to due process. In particular, citing *Troxel v. Granville* (2000) 530 U.S. 57 (*Troxel*), Kristina contends that recognizing Charisma as a parent violated her fundamental parental right to rear Amalia.

In *Troxel*, the United States Supreme Court struck down on due process grounds a visitation order under a Washington statute that allowed " '[a]ny person' to petition a superior court for visitation rights 'at any time' " and authorized the court "to grant such visitation rights whenever 'visitation may serve the best interest of the child.' " (*Troxel*, *supra*, 530 U.S. at p. 60.) Under the statute, Granville, a single mother, was required to permit her children's paternal grandparents to visit the children on a schedule imposed by the trial court. (*Id.* at pp. 60-61.) The Supreme Court explained that the Fourteenth

Amendment's due process clause[25] not only guarantees fair process but also "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " (*Troxel*, at p. 65; see also *Dawn D.*, *supra*, 17 Cal.4th at pp. 939-940.) The court, in a plurality opinion written by Justice O'Connor, concluded the nonparental visitation order "was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody and control of her two daughters." (*Troxel*, at p. 72.)[26]

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25 The due process clause of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." (U.S. Const., 14th Amend., § 1.)

26 *Troxel* did not hold that the Washington statute was unconstitutional per se or that the due process clause requires "all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." (*Troxel*, *supra*, 530 U.S. at p. 73; see also *In re Marriage of Harris* (2004) 34 Cal.4th 210, 223-226.) Instead, the court's plurality emphasized

Troxel is inapposite. There, the court considered a nonparental visitation statute (*Troxel, supra*, 530 U.S. at p. 73); at issue here is a statute determining the identity of Amalia's parents. Unlike the order in *Troxel*, the order declaring Charisma a parent of Amalia by definition did not extend rights to a nonparent. Moreover, as in *K.M. v. E.G.*, *supra*, 37 Cal.4th at page 144, neither Charisma's nor Kristina's "claim to parentage preceded the other's." In that case, the California Supreme Court rejected an analogy to *Troxel*, reasoning "K.M.'s claim to be the twins' mother because the twins were produced from her ova is equal to, and arose at the same time as, E.G.'s claim to be the twins' mother because she gave birth to them." (*K.M.*, at p. 144.) In this case, Kristina and Charisma decided to have a child

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that the Washington statute was "breathtakingly broad," because it permitted a court to "disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." (*Troxel*, at p. 67.)

together, they jointly pursued the goal of Kristina becoming pregnant, and Charisma was present at the birth and cut the umbilical cord. Kristina's parentage claim arises from the fact that she gave birth to Amalia. (*Ibid.*; *Elisa B.*, *supra*, 37 Cal.4th at p. 116.) And, at the time of the birth, Charisma had an inchoate parentage claim because she "actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child . . . would be raised by [Kristina] and her as coparents." (*Elisa B.*, at p. 122; see also *id.* at p. 125.) Charisma's parentage claim was not legally complete until she accepted Amalia into her home, but it arose at the same time as Kristina's claim. Because Charisma ultimately satisfied the legal standards for presumed parent status and her showing was not rebutted, declaring her a parent is not giving parental rights to an unrelated individual; it is recognizing the parental role that existed from birth. (See *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 422, 445 [rejecting analogy to *Troxel* in second parent adoption context and stating that

former same sex partner with no biological connection to child is not "just 'any person' [citation]; she is a prospective adoptive mother"].)

Although Kristina fails to frame the issue in this fashion, her true complaint is that the state has seen fit to declare a person without a biological connection to Amalia a parent. This involves a different liberty interest than at issue in *Troxel* and other cases cited by Kristina; in those cases, the identity of the parents was not in dispute. (*Troxel, supra*, 530 U.S. 57; *Stanley v. Illinois* (1972) 405 U.S. 645; *Prince v. Massachusetts* (1944) 321 U.S. 158.) The distinction is critical because the courts "have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. [Citations.]" (*Washington v. Glucksberg* (1997) 521 U.S. 702, 721 (*Glucksberg*); see also *Dawn D., supra*, 17 Cal.4th at p. 940.) "This 'careful description' is concrete and particularized, rather than abstract and general."

(*Dawn D.*, at p. 940.)[27] Kristina's claim is essentially that as the biological mother, and in the effective absence of a biological father, she has a fundamental right to decide whether Amalia has a second parent. However, she presents no authority or reasoned argument that a state infringes on a biological parent's substantive due process rights by extending parental status to a nonbiological parent in the circumstances of this case. (See *Michael H. v. Gerald D.* (1989) 491 U.S. 110, 129-130 (plur. opn. of Scalia, J.) [state did not violate biological father's constitutional rights by denying him an opportunity to rebut a presumption that

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[27] It is not appropriate "to define a fundamental constitutional right or interest in so narrow a fashion that the basic protections afforded by the right are withheld from a class of persons . . . who historically have been denied the benefit of such rights." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 824.) But in this case there are actually two different rights at stake—the right of parents to rear their children and the arguable right of a biological mother to determine whether her child has a second parent. Also, Kristina is not, with respect to the asserted right, a member of a historically deprived class.

husband of mother was father; "[i]t is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted"].) It may be that there are different circumstances in which such an order would be unconstitutional, but any such determination would require a careful analysis of the specific facts and interests involved in the case. (See *Troxel*, at p. 73.)

Not only has Kristina failed to present relevant authorities and analysis regarding the actual asserted liberty interest at issue, but she fails to address the "complex balancing of competing interests" (*Glucksberg*, *supra*, 521 U.S. at p. 722) necessary to resolution of substantive due process claims, despite the fact that this court identified some of the potential competing interests in *Charisma I*. There, we pointed out that "a rule that allowed the biological mother to unilaterally deny presumed parent status would potentially implicate the constitutional rights of the person

seeking such status [citation] and the constitutional rights of the child in the establishment of the parent-child relationship [citation]." (*Charisma I, supra,* 140 Cal.App.4th at p. 308; see also *Kelsey S., supra,* 1 Cal.4th at p. 849 [holding that it would violate an unwed father's constitutional rights to allow "a mother unilaterally to preclude her child's biological father from becoming a presumed father"].) We also pointed out that "[s]uch a rule would be contrary to the 'public policy favoring that a child has two parents rather than one.' [Citation.]" (*Charisma I,* at p. 308.) Finally, an assessment of the weight of Kristina's interest in denying parental status to Charisma would need to take into account Kristina's own conduct prior to and immediately after Amalia's birth, which led Charisma to understand that she would be a parent.

We point out these competing interests and considerations to elucidate the fallacy of Kristina's simplistic analogy to *Troxel, supra,* 530 U.S. 57, and to demonstrate the complexity of a substantive due process claim based on the actual liberty

interest affected by the trial court's order. However, because Kristina has failed to provide citations to authority and reasoned argument regarding the balancing of interests necessary to resolve that due process claim, we deem the argument waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) This is particularly appropriate in light of the admonition from the United States Supreme Court that "constitutional protections in this area are best 'elaborated with care.'" (*Troxel*, at p. 73; see also *In re Marriage of Harris, supra,* 34 Cal.4th at p. 228 ["we should be very careful in identifying the scope of the due process interest in parenting"].)

We conclude Kristina has failed to meet her burden of showing that the order declaring Charisma to be Amalia's second parent was an unconstitutional infringement of her state and federal rights to substantive due process. (See *Dawn D., supra*, 17 Cal.4th at p. 939 [courts must "always presum[e] the constitutional validity of legislative acts and resolv[e] doubts in favor of the statute"].)

IV. *The Trial Court Did Not Abuse its Discretion in its Handling of the Custody Evaluators*[*]

In March 2007, the trial court appointed Dr. Jacqueline Karkazis and Dr. Sharon Lazaneo as custody evaluators in this matter. Dr. Lazaneo testified that she had performed almost 4,000 evaluations for the Alameda Superior Court over the course of 42 years. The trial court found the evaluators are "among the most experienced in this County," having over 80 years of combined experience. Kristina contends the trial court erred when, in July 2007, it declined to disqualify the evaluators following disclosure of a financial contribution they made to the National Center for Lesbian Rights (NCLR), which assisted Charisma at an earlier stage and continues to have an interest in the case. In particular, the evaluators informed the court that in 2004 they made a donation to an NCLR memorial fund in the memory of a recently deceased family law practitioner, pursuant to a request made by the decedent's partner for donations to the fund in lieu of flowers.

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[*] See footnote, *ante*, page 1.

The evaluators informed the court they made no further donations and are not members of the NCLR.

Kristina argues the contribution demonstrates the evaluators had a conflict of interest they failed to disclose, in violation of California Rules of Court, rules 5.220(h)(10) and 5.225(k)(6). Kristina has not shown the evaluators violated those rules because she cites to nothing in the record demonstrating they were aware or should have been aware of the NCLR's involvement in this case. Furthermore, Kristina has not shown the trial court abused its discretion in refusing to disqualify the evaluators. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) The court could reasonably have concluded that a one-time contribution three years prior in memoriam to a former colleague did not require disqualification, particularly in light of the evaluators' extensive experience and the fact that they had already

commenced work on the matter. Kristina presents no authority to the contrary.[28]

Kristina also contends the trial court improperly "punished" her for moving to Texas when it required her to choose between bringing Amalia to California for a psychological custody evaluation or paying $7,500 to have the two court-appointed evaluators travel to Texas. The court's order indicated that if Kristina brought Amalia to California, all expenses would be split by the parties. Kristina does not argue the court abused its discretion and she presents no authority that the court's order constituted punishment for her relocation.[29] The court's order was reasonable and

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[28] Charisma contends Kristina forfeited her claim that the evaluators should have been disqualified because Kristina did not file a timely writ petition seeking review of the court's order. We need not and do not address that argument.

[29] The cited portions of the cases Kristina relies on simply indicate that she has a constitutional right to travel and that she did not need to seek permission from the court before moving to Texas. (*Attorney General of N. Y. v. Soto-Lopez* (1986) 476 U.S. 898, 902; *In re Marriage of Burgess* (1996) 13

not punitive; it only imposed additional costs on Kristina if she refused to bring Amalia to California, due to the additional costs that would be incurred if the evaluators had to travel to Texas.

Finally, Kristina contends she had an absolute right to audiotape the psychological evaluation of Amalia and the trial court erred by requiring the evaluators' permission for any such recording. The evaluators refused to permit the recording, informing the court, "[i]n the combined near 100 years of our experience, we have never permitted parties or counsel to video tape, audio record or retain the services of an expert to attend child custody evaluation interviews." Kristina relies on Code of Civil Procedure section 2032.530, subdivision (a), which provides: "The examiner and examinee shall have the right to record a mental examination by audio technology." However, that

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Cal.4th 25, 32.) The cited authorities do not suggest it is improper for a court to impose on the party who moved away the natural consequences of the decision to move, much less the consequences of the party's refusal to return to California for a necessary custody evaluation.

provision is part of a chapter in the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.) providing for physical and mental examinations as part of discovery in litigation. (Code Civ. Proc., § 2032.010 et seq.) Code of Civil Procedure section 2032.020, subdivision (a), provides: "Any party may obtain discovery. . . by means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition . . . of that party or other person is in controversy in the action." Even assuming as a general matter that the Civil Discovery Act applies to this action under the UPA, the evaluation at issue did not constitute "discovery" in the action. Instead, it occurred pursuant to the court's appointment of the evaluators to aid the court in making custody and visitation determinations. "Courts order child custody evaluations, investigations, and assessments to assist them in determining the health, safety, welfare, and best interest of children with regard to disputed custody and visitation

issues." (Cal. Rules of Ct., rule 5.220(b); see also Family Code § 3011 [specifying factors trial court "shall" consider in determining best interests of the child in a UPA action]; Family Code § 3021, subd. (f).) Accordingly, Code of Civil Procedure section 2032.530, which only addresses mental examinations as part of party discovery, is inapplicable. In any event, Kristina has cited no authority for the proposition that the court's refusal to permit recording of the evaluation provides a basis for reversal of its orders; notably, the evaluators testified at trial and were subject to cross-examination. (See Code Civ. Proc., § 475.)

Kristina's claims related to the custody evaluators fail.

V. ***Kristina Has Not Made a Showing of Judicial Bias****

Kristina also contends the trial court's rulings relating to the evaluators, combined with certain comments made by the court in its *tentative* ruling on custody and visitation, raise doubt

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* See footnote, *ante*, page 1.

regarding the trial court's impartiality. For example, the trial court's tentative ruling stated, "when [Charisma] tried to maintain contact with Amalia, [Kristina] fled to Texas where she had the support of her sister, mother and other family members." Kristina complains regarding the court's use of the word "fled," although she does not demonstrate a lack of evidentiary support for that characterization. In any event, the court omitted the word "fled" in the final decision, replacing it with "relocated." Similarly, in the final decision the court changed language stating that Kristina shall not "interfere" with Amalia's therapy process to state that neither party shall interfere. The court also originally required Kristina to pay for half of Charisma's travel expenses for the reunification process; Charisma's cross-appeal arises from the court's decision to change that ruling. In sum, most of the examples relied upon by Kristina actually show the court's solicitude for Kristina's concerns and responsiveness to her objections, rather than a lack of impartiality.

Kristina urges this court to apply the standard for judicial misconduct applicable in the trial context, requiring a reviewing court to reverse a judgment where "the court's comments would cause a reasonable person to doubt the impartiality of the judge." (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1008.) But all of the court's statements and rulings cited by Kristina in her briefs, taken as a whole, would not cause a reasonable person to doubt the court's impartiality. (See *Haldane v. Haldane* (1965) 232 Cal.App.2d 393, 395 [" 'a trial judge will normally and properly form opinions on the law, the evidence and the witnesses, from the presentation of the case. These opinions and expressions thereof may be critical or disparaging to one party's position, but they are reached after a hearing in the performance of the judicial duty to decide the case, and do not constitute a ground for disqualification' "].)

VI. *Charisma's Cross-Appeal*

The court-appointed custody evaluators recommended a gradual process to reestablish Charisma's relationship with Amalia, including

joint therapy sessions in Texas with a court-appointed therapist. In its tentative order following the April 2008 trial regarding custody and visitation, the trial court ordered the parties to equally share the costs of the reunification process, including the therapist's fees and Charisma's airfare costs to travel to Texas. After Kristina objected, the court concluded it lacked authority to require Kristina to pay a share of Charisma's travel costs because there was no child support order and Kristina was not technically a "move away" parent. The court also stated that forcing Kristina to bear a portion of the travel costs would be "punitive," which was a reference to Kristina's argument that forcing her to bear a portion of the costs would be a "punitive penalty against" her "exercise of her constitutional right to travel." The court required Charisma to bear 100 percent of the travel costs.

In her cross-appeal, Charisma contends the trial court erred in concluding it lacked authority to order the parties to share the travel expenses. She argues the court had broad discretion to apportion the costs of visitation in the best interests of the

child. We agree. In the proceeding at issue, to determine custody and visitation issues in a UPA action (§ 3021, subd. (f)), the court had "the widest discretion to choose a parenting plan that is in the best interest of the child" (§ 3040, subd. (b)). (See also *Burgess, supra,* 13 Cal.4th at p. 31.) The court was required to consider "*all the circumstances* bearing on the best interest of the minor child." (*Burgess*, at pp. 31-32; see also §§ 3011, 3021, subd. (f).) One relevant consideration was the state policy encouraging frequent visitation. Section 3020, subdivision (b), provides: "The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have . . . ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. . . ." Charisma points out that, were she forced to bear the entire financial burden, the cost of airfare could interfere with her ability to frequently visit Amalia in Texas.

In *Burgess*, *supra*, 13 Cal.4th at page 40, the Supreme Court discussed the trial court's authority to fashion visitation orders, stating "the trial court has broad discretion to modify orders concerning contact and visitation to minimize the minor children's loss of contact and visitation with the noncustodial parent in the event of a move, e.g., by increasing the amount of visitation with the noncustodial parent during vacations from school, *allocating transportation expenses to the custodial parent*, or requiring the custodial parent to provide transportation of the children to the noncustodial parent's home." (Italics added; see also *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1101 [trial courts must be permitted to "exercise their discretion to fashion orders that best serve the interests of the children in the cases before them"].) Although the quoted text in *Burgess* is phrased in the language of a "move-away" case, in which a parent who has sole physical custody under an existing judicial custody order seeks to relocate, the case actually involved an initial order of custody and visitation. (*Burgess*, at p. 37 & fn. 8.) *Burgess*

discussed "move-away" cases in order to broadly clarify the law because "considerations and interests in both types of custody matters are closely interrelated." (*Id.* at p. 37, fn. 8.) Accordingly, *Burgess* does not suggest a court's authority to allocate transportation expenses is limited to "move away" cases. Neither does the decision suggest any such allocation must be made in the context of a child support order.

Kristina, in her briefing on the cross-appeal, does not dispute that the trial court had authority to order the parties to share travel expenses and does not argue that such an order would have violated her constitutional right to travel. Instead, she asserts that the trial court actually exercised its discretion and concluded it would be inappropriate to require Kristina to share the travel costs. That argument is without merit. The court's final order on the issue states that it initially "was inclined to order that [Charisma's] travel costs to Texas be split 50/50, but [Kristina] objected to this provision." The court then noted that the issue sometimes comes up in the context of

child support orders and in the context of "move aways." The court concluded: "Here there is no child support order or request for one, and [Kristina] moved away at a time when under the then-current state of the law [Charisma] had no standing to object and the court no power to impose conditions on the move. Under these circumstances, the court concludes that forcing [Kristina] to bear a portion of [Charisma's] travel costs would be 'punitive' and, more importantly, without authority." The order is unambiguous; the trial court concluded it lacked authority to require the parties to share the travel expenses.

We remand for the trial court to exercise its discretion to determine whether, in the best interests of Amalia, the parties should share Charisma's travel costs to Texas for the reunification process.

DISPOSITION

The trial court's orders are affirmed, except as to allocation of Charisma's travel expenses for the reunification process. On that issue, we reverse and remand with directions that the court exercise

its discretion. Costs on appeal are awarded to Charisma.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.*

(A122264)

* Judge of the Contra Costa Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Superior Court of Alameda County, No. HF04153838, Wynne S. Carvill and Kevin R. Murphy, Judges.

Squire, Sanders & Dempsey LLP, Amy E. Rose, Robert J. Guite and Jason M. Richardson for Plaintiff and Appellant.

Liberty Counsel and Mary E. McAlister for Defendant and Appellant.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

No. HF04-153838

CHARISMA L. RILEY,

Petitioner,

v.

KRISTINA M. SICA,

Respondent.

STATEMENT OF DECISION AND RULING ON ISSUES OF CHILD CUSTODY AND VISITATION

On April 21, 2008, both parties appeared with counsel for *t*rial on the issues of custody and visitation, testimony and other evidence were received on April 21 and 22, and both sides presented closing argument. The court has considered all the evidence presented at trial and the arguments and filings submitted as of this date, including the objections to the court's tentative decision. Pursuant to Family Code section 3022.3[1] and Code of Civil Procedure section 632, the court now enters the following explanation of the factual and legal basis of decision on the principal controverted issues

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1. Unless otherwise indicated all citations to statutes herein are to the Family Code, and all citations to Rules are to the California Rules of Court.

and its "final" order on the custody and visitation issues presented:

A. General Background

1. The parties are Petitioner Charisma L. Riley ("Riley") and Respondent Kristina M. Sica ("Sica"). Sica is the biological mother of the minor Amalia Lynne Sica ("Amalia") (d/o/b 04/08/2003).

2. On May 3, 2004, Riley filed the present "Petition to Establish Parental Relationship, Custody, and Visitation." After a hearing on June 2, 2004, based on the decisional law at the time, the court ruled that Riley lacked standing to bring the action and dismissed it. An appeal was taken, and on June 22, 2006, the Court of Appeal ruled that Riley had standing and remanded the case to the trial court to answer five factual questions. *Charisma R v. Kristina* (2006) 140 Cal.App.4th 301, 303. On December 27, 2006, following an evidentiary hearing, the court answered the five questions posed by the appellate court and, based on those answers, ruled that Riley is a legal parent of Amalia.

3. As custody and visitation remained disputed issues, on March 5, 2007, this court ordered a custody evaluation and on March 20, 2007, appointed Jacqueline Karkazis, LCSW, and Sharon L. Lazanco, Ph.D. ("K&L"), as the evaluators. The order directed a full evaluation pursuant to Rule 5.220(c)(4) and set a hearing on the underlying issues for June 13, 2007.

Due to various delays that need not be fully reviewed at this juncture,[2] the K&L evaluation was not submitted until February 27, 2008, and the hearing thereon was thus postponed until April 21, 2008.

B. The K&L Evaluation

5. The evaluators' report sets forth their procedures, the current situation as reported by each party, their observations of the child, their collateral contacts, a summary with their conclusions and their recommendations. The report contains extensive quotations from the parties and the collateral parties about the history of the parties, their relationship, the child, etc. Both evaluators testified at trial and were subject to cross-examination.

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2. One relatively minor delay occurred when Sica sought to disqualify the evaluators after they were appointed. The ground for disqualification was an alleged undisclosed conflict of interest in that the evaluators had made a contribution in memoriam for a colleague to the National Center for Lesbian Rights, which has supported Petitioner in this case. The court ruled that there was no conflict of interest created by the donation and no failure to disclose such as would warrant disqualification, Another delay occurred when Sica refused to travel to California with Amalia to participate in the evaluation process—necessitating the evaluators travelling to Texas. Further delay occurred when Sica's counsel attempted shortly before the first scheduled evaluation meetings in Texas to either insert Sica's expert into the sessions or videotape those sessions (later amended to an audiotape request). While such a request could have been made well in advance and sorted out on a duly noticed motion, the timing of the demand led to a cancellation of the evaluators' trip while counsel and the court dealt with the issue. The trip then had to be re-scheduled. Any one of these incidents might be understandable, but collectively they contributed to the delay of the entire process.

6. The evaluators did not conduct any formal (*i.e.*, "objective") psychological testing or assessments. When such testing is warranted, their practice is to employ a third-party professional to conduct such tests and assessments. In this case, they judged it unnecessary and also impracticable given the fact that the parties reside in different states and, in the view of the evaluators, such testing and assessments should be performed on both parents by the same professional.

7. The K&L report was received into evidence subject to Sica's hearsay objection. Based on that objection, the court excludes from its consideration any statements in the K&L report made by non-parties for purposes of proving the truth of the matters asserted by such non-parties and receives such material for the limited purpose of reflecting the foundation of the evaluators' opinions.[3]

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3. The court is well aware of the fact that the Evidence Code applies to this proceeding. *See Elkins v. Superior Court* (2007) 41 Cal.4th 1337. The court is also cognizant of section 3111(a), which directs that a custody evaluation report shall be filed and "may be considered by the court." Section 3111(c) provides further that such a report "may be received in evidence on stipulation" in which case it is "competent evidence as to all matters contained in the report." Reading these provisions together, the court concludes that even without a stipulation the court may consider the recommendations and may also consider the entire report to determine whether the recommendations have an adequate foundation but — unless there is a stipulation — may not consider hearsay statements in the report for the truth of the matters asserted or other material in the report that does not have an apparent foundation.

8. The evaluators recommended that Sica be awarded legal and physical custody of Amelia and that Riley be awarded visitation rights to Amalia, subject to a reunification plan that would be overseen by a therapist in Texas near Sica's and Amalia's home. The plan would provide for joint therapy sessions with Riley and Amelia during Riley's Texas visitation and a gradual expansion of visitation as circumstances may warrant.

C. Dr. DeAlmeida's Opinion

9. Sica presented Steven DeAlmeida, Dr.P.H., Ed.D. ("SDeA"), as a rebuttal expert. He explained why, in his opinion, the interview techniques employed by K&L are more subjective and less reliable than the relatively more objective tools and protocols he employs. He presented a detailed report consisting of the extensive testing and assessment data he developed with respect to Sica and Amalia.

SDeA did not conduct a similar battery of tests and assessments with respect to Riley because she was "unavailable" to him.[4] Because he did not have a similar

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4. Sica has known for well over a year that a custody evaluation was to be performed, and early on in the process K&L, disclosed their protocols, which are consistent with those generally used in custody evaluations in this court. Had Sica or her retained expert wished to conduct tests and assessments on Riley, Sica's counsel could have requested it in the Fall of 2007, or even compelled it through the timely pursuit of the various discovery processes provided in the Code of Civil Procedure. But these issues were not raised until shortly before trial. The court can only infer that Sica made a tactical choice not to pursue the alternatives obviously available at any time after K&L were selected in 2007, That is why Riley was "unavailable" to SDeA.

set of materials with respect to Riley, he was limited in his ability to opine on the recommendations presented by K&L, or offer opinions with respect to Riley as a parent.

11. He did explain, however, the risks he believed the K&L reunification recommendations presented and opined that he could not recommend them unless and until Riley underwent the kind of testing and assessment he performed with Sica. He indicated information made available to him that "raised concerns" regarding "possible risk factors to Amalia" that "should be addressed in as scientifically and unbiased method as possible."

D. Findings on Controverted Issues

12. Despite the dispute among the experts regarding the appropriate protocols for a custody evaluation, they presented a broad consensus on at least two important issues. First, Amalia is an emotionally and physically healthy five-year old. She is warm friendly, organized, playful and communicative and relates well to people. Second, Sica and her extended family have provided Amalia with a warm, stable and supportive home environment in which she is thriving.

13. Unfortunately, there is also no doubt that the relationship between Sica and Riley is completely broken. Sica took Amalia and left Riley when Amalia was only a few months old, and when Riley tried to maintain contact with Amalia, Sica relocated to Texas, where she had the support of her sister, mother and other family members. She is adamantly opposed to Riley having any

contact with Amalia or to Amalia even knowing who Riley is. Riley's attempts to establish a presence in Amalia's life and even the very thought of such a presence are major "stressors" to Sica. While there is no history of domestic violence in their relationship, after Sica left with Amalia there was at least one unsettling contact between the parties when Riley came to Sica's house at 3:00 a.m. demanding to see Amelia. Based on that and multitude of other circumstances, Sica is totally alienated from Riley and would find it extremely difficult to co-parent with her.

14. Sica also has a number of concerns about Riley's parenting abilities and judgment. These were explored and considered by K&L and none were considered significant enough to warrant denying her visitation or at least the opportunity to attempt reunification with Amalia. SDeA admits he has an insufficient basis to disagree with K&L but, as previously noted, believes that the issues raised by Sica should be more formally explored before proceeding with reunification.

15. Of all the concerns raised by Sica, the one that has some traction is the claim that Riley posted on the internet photos of Amalia in her first few weeks. Some of these show the child naked. There is a factual dispute as to whether these photos were password protected so as to be available only to family members or were generally available. Sica criticizes the K&L report for not exploring this more fully. The photos in question were finally presented to the court in Sica's surrebuttal case.

16. In considering the weight to accord to SDeA's critique of the K&L evaluation and the other criticisms raised by Sica, the court has considered both the methods used by K&L and their qualifications. The court finds that these two evaluators are duly qualified under sections 3110 *et seq.* and among the most experienced in this County. Collectively they have over 80 years experience performing such evaluations in all kinds of cases. Their evaluation was performed in a manner consistent with Judicial Council Standards adopted pursuant to section 3117 and in conformity with the provisions of sections 3111 through 3118 and the applicable Rules of Court.

17. On cross-examination they explained their methodology and their decisions as to what to include in the report. With respect to the photographs, they did explore the issue in the interviews of both parties and collateral contacts but, based on what was presented to them, concluded that the posting of photographs of a new born did not present a material issue. After viewing what all agree were family photographs, the court finds that at most the posting of these photos — if they were not password protected — raises a question of judgment. To characterize them as "child pornography" is a serious overstatement that simply reflects the highly contentious nature of this proceeding.

18. SDeA's critique of the K&L report does not raise serious questions regarding its foundation, methodology or conclusions. His preferred methodology, while perhaps common in Texas, is not commonly used here or required by the governing California standards. His conclusion that more objective testing is warranted

before proceeding with reunification is unpersuasive and, in any event, an option that may be pursued in the future by the therapist that has been selected if she concludes it is warranted.[5]

19. As already noted, SDeA conducted no tests or assessments of Riley and, indeed, had never met her before the trial. As neither of the parties testified and the only lay witness addressed a very narrow issue, the significant evidence before the court with respect to Riley's character, parenting skills and other traits is the K&L report. Given the hearsay objection, the statements of others contained in the report are inadmissible on those issues. As a result, the only evidence is the opinion of the evaluators that Riley "is a relational and responsive person, who intermittently crosses boundaries by embellishing, for instance, medical vignettes with too much detail, and who is gifted when it comes to identifying the needs of children, and understanding how to empathetically communicate in age appropriate ways." The court accepts this opinion as a fair summary of Riley. There is certainly no credible evidence admitted during this trial that would suggest Riley is not fit to perform the obligations of a parent.

E. Application of Governing Law

20. Section 3100 clearly states that, when making custody orders, "the court *shall* grant reasonable

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5. The therapist selected (Dr. Jean Guez) evidently was at one time associated with SDeA, and the latter agreed that she is familiar with his testing procedures and capable of administering them if she deems it appropriate.

visitation rights to a parent unless it is shown that that the visitation would be detrimental to the best interests of the child." (Emphasis added.) The foregoing implements the declared legislative policy in this State "to assure that children have *frequent and continuing contact* with both parents after the parents have . . . ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy." Fam.Code § 3020(b) (emphasis added). The case law also underscores the duty of the courts to strive to maintain the parent-child relationship and deny visitation "[o]nly under extraordinary or exceptional circumstances," *Carnacho v. Camacho* (1985) 173 Cal.App.3d 214, 219. *See also Gadbois v. Superior Court* (1981) 126 Cal.App.3d 653, 657 (reasonable visitation must be granted pendente lite); Hogoboom & King, Cal. Prac. Guide: Family Law (The Rutter Group 2007), §§ 7:480 *et seq.*

21. Sica correctly points out that the declaration of legislative policy in section 3020 also provides that "it is the public policy of this state to assure that the health, safety and welfare of children shall be the court's *primary concern* in determining the best interest of children when making any orders regarding . . . visitation of children." Fam.Code § 3020(a) (emphasis added.) From this Sica argues that the "health, safety and welfare" consideration always trumps the policy of "frequent and continuing contact." But from the structure of section 3100 it is fairly clear that there is a presumption favoring "reasonable visitation . . . *unless* it is shown that the visitation would be detrimental to the best interest of the child." (Emphasis added.) That means it is the burden of the party seeking to deny any visitation to prove that

visitation would be detrimental. Here, that is the burden Sica must carry.

22. Sica has three principle arguments as to why reunification at this time is not in Amalia's best interest.[6] First, she argues that Amalia does not know Riley and, until recently, did not even know of her existence. Thus unlike the typical case where section 3100 is utilized to preserve an existing parental bond, here it is being used to create a relationship in the first place. Second, even though Amalia now knows Riley exists, Amelia does not know Riley as her "second Mom," and it is argued that that concept is too difficult for a five-year old to grasp without running a risk of de-stabilizing her in some way. Third, Sica points to the hostility between the parents here that, if allowed to play out in Amalia's life, can be problematic. Given the depth of the alienation between these parents, it is argued that no good can come from going down the reunification road.

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6. There are a number of other, alternative arguments advanced by Sica to claim that visitation should be denied in this case — for example, the dispute over the photographs. But given the significant burden she bears, the nature of the issues raised and the weakness of the evidentiary support, the court finds all of these other arguments insufficient either individually or collectively. Indeed, the mandate embodied in section 3100 has led this and other courts to order — with appropriate safeguards — reunification and visitation in cases involving felons, parolees, drug addicts and other clearly impaired parents. None of the alternative arguments raised by Sica come close to the circumstances found in these other cases where visitation with appropriate safeguards is ordered.

23. With respect to the first argument, no case has been called to the court's attention suggesting that preserving an existing parent-child relationship is only important where the child is aware of the second parent or that the declaration of policy in section 3020(b) is somehow limited to that circumstance. That section, for example, refers at one point to the preservation of contact "after the parents have separated or dissolved their marriage." The concept of the child having been old enough at the time of separation to *remember* the other parent or to have formed a relationship is not found in the statute. If the legislature had intended to express a policy of preserving parent-child relationships only where a parental bond had already been established, it could have drafted the statute accordingly.

24. As for the second argument, this issue has, in a way, already been addressed by the courts. In *Elisa B. v. Superior Court* (2005) 37 Cal.4th 105, 123, the court recognized a strong public policy favoring a child "having two parents, rather than one, as a source of both emotional and financial support." Indeed, it was that very language that the appellate court in the initial appeal of this case cited in the course of recognizing Riley as one of Amalia's parents. *Charisma R., supra,* 140 Cal.App.4th at 306. Given this legislative directive and its prior role in this very case, the court is reluctant to depart from that directive on the grounds that a child of this age may have difficulty with the "two Mommy" concept. While that may be an issue requiring attention in the reunification process, the legislative judgment is that any such difficulty is counterbalanced by the value of having two parents to lend emotional as well as financial support to the minor.

25. Moreover in this case, the record reflects that Amalia has the good fortune to be in a family in which she is already exposed to the example of a same sex couple in a committed relationship — namely, Sica's own sister and her partner. This family circumstance may make Amalia's adjustment to her parental situation somewhat easier than would be the case with another five-year old. To accept Sica's argument under these circumstances and on this record would be, in effect, to carve out a categorical exception to the gender-neutral policies expressed in *Elisa B.* for children of "tender years," It was Sica's burden to prove that the risks to Amalia of proceeding with reunification at her current age, given the potential conceptual difficulties presented, outweigh the benefits to her growing up with two parents. Sica did not carry that burden.

26. The third argument rests on the history of the parties and the hostility, especially on Sica's part, between them. As any family law bench officer quickly learns, parental conflict is not in the best interest of a child. Custody and visitation arrangements should, to the extent possible, be crafted to protect children from such conflict. Sica's exclusion of Riley from Amalia's life for the better part of the last four years is certainly one way to protect Amalia from that conflict.[7] But to

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7. The evidence this record reflects one reason why even complete exclusion is not by any means a way to guarantee such protection. For example, when Amalia went to the evaluation interview where she would see the evaluators and Riley, Amalia made a comment about being fearful of the "mean lady with long hair" — a reference that could only have been to Riley. The court accepts the evidence that Sica did not directly coach

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recognize — indeed, to embrace that solution would be to reward those parents who seek to deprive their children of the benefits the legislature has declared flow to a child from having two parents. It is not an acceptable solution, is not in the best interest of the child and is in direct conflict with the fundamental policies of this State as embodied in the Family Code.

27. While all of the foregoing has been framed in terms of the court's view that Sica carries the burden of proof in objecting to *any* visitation, as the court reviews the entire record it is of the firm view that, even if the, burden were on *Riley* to prove that visitation is in Amalia's best interest, the conclusion would be the same. In the court's view, the policies of the Family Code and directives of the *Elisa B.* court and the appellate court in this case all point to a strong public policy to promote a child having two parents. Riley has presented evidence, which on balance, proves by a preponderance of the evidence that she has the capabilities of being a good parent and that the concerns raised by Sica do not justify denying all visitation. At best, Sica's evidence has "raised concerns," but all of those concerns can be addressed in the reunification process by providing professional support to Amalia and guidance to the parents and by crafting particular conditions to address particular concerns as they materialize. That's what family courts do.

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Amelia to express this concern, but this incident underscores how children pick up on what is discussed and expressed in other ways within their home and extended family.

F. Miscellaneous Issues

28. "Option" to Defer Reunification: Notwithstanding the foregoing, the court notes that Riley has been respectful of the impact this process may have on Amalia. Riley could have, for example, sought visitation pendente lite and cited strong legal authority in support of such a request. *See Gadbois, supra,* 126 Cal.App.3d at 657. She did not force the issue but waited for the results of the custody evaluation even in the face of various delays. Such behavior suggests she is sensitive to the core issue — namely, Amalia's best interest. In the event that Riley decides at any point to defer the reunification process in order to protect Amalia, such deferral shall not in any way be taken as a waiver of her right to renew her request at a later time.

29. Importance of Cooperation: The court is also mindful of Sica's resistance to this entire process. When the litigation began, she certainly was within her rights to oppose Riley's requests based on the state of the law at the time. She has also been well within her rights to request a custody evaluation, to challenge that evaluation and to present contrary evidence. There is a point, however, where the bona fide assertion of one's legal rights may cross over to obstructionism. Section 271 provides remedies for such conduct. This court expects both parties to follow its orders and use their best efforts to make this deliberate, gradual and child-centric process work. Failure to do comply will be dealt with on appropriate application by the aggrieved party.

30. Travel Expenses: Initially, the court was inclined to order that Riley's travel costs to Texas be split 50/50,

but Sica objected to this provision. The court notes that this issue sometimes comes up in the context of child support and whether visitation travel costs might be considered a "negative add-on," *Compare In re Marriage of Fini* (1994) 26 Cal.App 4th 1033, 1039, *with In re Marriage* of *Gigliotti* (1995) 33 Cal.App.4th 518, 529; Hogoboom & King, *supra*, § 6:292 *et seq.* The issue also comes up in the context of "move aways" and whether granting a request to move should be conditioned on the moving parent subsidizing the travel costs of the parent left behind. See generally Hogoboom & King, *supra*, § 6:293.1. Here there is no child support order or request for one, and Sica moved away at a time when under the then-current state of the law Riley had no standing to object and the court no power to impose conditions on the move. Under these circumstances, the court concludes that forcing Sica to bear a portion of Riley's travel costs would be "punitive" and, more importantly, without authority.

31. Outstanding Sanctions Issue: On October 4, 2007, the court took under submission the issue of sanctions arising from the difficulties encountered with the evaluation going forward in Texas. The court intentionally deferred awarding sanctions until the conclusion of the hearing on this matter in the hope that the pendency of the motion might have a moderating influence. The process in fact did go relatively smoothly after October and is now concluded. The court now awards sanctions payable by Sica to Riley in the amount of $842.24 as compensation for the expenses detailed in Riley's supporting declaration. The court also awards Riley attorneys' fees of $1,000. See Local Rule 5.65(a)

and its predecessor Rule 11.0.8(c). The foregoing sanctions shall be paid within sixty (60) days.

32. Entry of Judgment: On October 23, 2007, the court entered an order after hearing that memorialized the portion of the December 27, 2006 order in open court that granted the petition to establish paternity. Judgment should be entered on that order, and the court expects a form of order to be prepared by Petitioner and submitted to Respondent for approval as to form. The court will sign and enter an appropriate judgment if and when presented.

G. Order

33. Based on the foregoing, the court ORDERS the following:

a. Sica shall have sole legal and physical custody of Amalia except as provided herein;

b. Sica shall contact Dr. Guez forthwith to arrange for such therapy appointments for Amalia as Dr. Guez deems necessary to assess the steps that need to be taken to facilitate a reunification process;

c. At or about the time these sessions begin, Sica shall contact Dr. Guez for advice as to how she should discuss and characterize these sessions when questioned by Amalia;

d. Sica and Riley shall both make themselves available to Dr. Guez to participate upon request in the therapy process;

e. Neither Sica nor Riley shall not direct, control, limit or otherwise interfere with the therapy process initiated by Dr. Guez;

f. Dr. Guez is authorized to conduct whatever tests or assessments she deems appropriate (if any) to facilitate her construction of a reunification process;

g. The custody evaluation, Dr. DeAlmeida's report and this Statement of Decision shall be provided to Dr. Guez by Riley's counsel;

h. Dr. Guez may communicate directly with either party, counsel, Ms. Karkazis, Dr. Lazaneo and/or Dr. DeAlmeida at her discretion;

i. While any of the foregoing may contact Dr. Guez, if Dr. Guez finds such contacts intrusive or burdensome, she may direct one or more of those contacting her to refrain from such contacts unless she initiates it;

j. Dr. Guez may implement visitation between Amalia and Riley at a time and setting that she deems appropriate — provided only that she give advance notice to both parents of the timetable;

k. Dr. Guez may also direct telephone contacts, the use of webcam, the exchange of photos and other measures of contact between Riley and Amalia if, when and as she deems them to he in Amalia's best interest;

l. The order entered on October 4, 2007, requiring monthly reports from Sica to Riley shall remain in effect until August 1, 2008, or until Dr. Guez has an opportunity to assess the situation and then directs to the extent appropriate the measures referenced in subparagraph "k" above — whichever is earlier;

m. If either parent objects that Dr. Guez is proceeding too quickly or too slowly, or otherwise objects to her directives, that parent may seek a hearing on shortened time by (i) contacting the clerk in D-la to determine the first available time, (ii) giving notice to the other side and (iii) then filing the appropriate application;

n. Within ten (10) days of this order becoming final, each party shall advise the court whether, in the event there is a dispute, it prefers the views of Dr. Guez to be presented directly to the court or through a mediator at Family Court Services;

o. The cost of the reunification services provided by Dr. Guez shall be borne 50/50 by the parties subject to re-allocation to the parent who either obstructs the process or unreasonably attempts to accelerate it in light of all the circumstances;

p. As long as there is no child support order or evidence of Riley's visitation being obstructed, her visitation costs shall be borne solely by her;

q. Sica shall pay the sanctions set forth in paragraph 31 above within sixty (60) days of the date of this order;

r. Neither parent shall disparage the other in the presence of Amalia or allow others to do so;

s. Neither parent shall discuss court proceedings in the presence of the minor — although if the minor inquires, a parent may assure the child that the parents and the court are "working things out" and that, in any event, she will not be "taken away" from her Texas home;

t. The foregoing is the court's "final" order on custody and visitation in the sense that it awards custody to one parent and directs that a re-unification process shall be commenced with the other parent, but as with all custody and visitation orders, the court reserves jurisdiction to monitor the progress of the re-unification effort, entertain requests for new orders as circumstances warrant and modify custody and visitation as may be appropriate;

u. This matter is hereby set for a progress report in D-1a at 9:05 a.m. on August 1, 2008, and unless otherwise ordered out-of-state parties and counsel may appear by telephone.

Dated: May 8, 2008

s/ Wynne S. Carvill
Wynne S. Carvill
Judge, Superior Court